(29,512)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 962.

HARRIET A. FROTHINGHAM, APPELLANT,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY; GRACE ABBOTT, CHIEF OF THE CHILDREN'S BUREAU OF THE DEPARTMENT OF LABOR; HUGH S. CUMMING, SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE, *ET AL.*

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 4, 1923.

Court of Appeals of the District of Columbia.

No. 3967.

HARRIET A. FROTHINGHAM, Appellant,

vs.

ANDREW MELLON, Secretary, et al.

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a Supreme Court of the District of Columbia.

In Equity.

No. 40788.

HARRIET A. FROTHINGHAM, Plaintiff,

vs.

ANDREW W. MELLON, Secretary of the Treasury; GRACE ABBOTT, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon-General of the Public Health Service; John J. Tigert, Commissioner of Education, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered: That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill.*

Filed December 19, 1922.

In the Supreme Court of the District of Columbia.

In Equity.

No. 40788.

HARRIET A. FROTHINGHAM, Plaintiff,

vs.

ANDREW W. MELLON, Secretary of the Treasury; GRACE ABBOTT, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon-General of the Public Health Service; John J. Tigert, Commissioner of Education, Defendants.

The Bill of Complaint of Harriet A. Frothingham respectfully shows:

I. That the Plaintiff is a citizen of the United States and of the State of Massachusetts, residing in the City of Boston in said state; that said Plaintiff is a tax payer of the United States, having assessed against her heretofore by the Commissioner of Internal Revenue taxes upon her income, all of which said taxes the Plaintiff has paid as and when the same became due and payable in accordance with the laws of the United States and all regulations passed in pursuance thereof.

The defendant, Andrew W. Mellon is the Secretary of the Treasury of the United States and is a citizen of the Commonwealth of Pennsylvania and a resident of Washington in the District of Columbia.

The defendant, Grace Abbott is chief of the Children's
2 Bureau of the Department of Labor, and the executive officer, under the provisions of the Act of Congress, approved November 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," known as and hereinafter called the Sheppard-Towner Act. She is a citizen of the State of Illinois and a resident of Washington in the District of Columbia.

The defendant Hugh S. Cumming is Surgeon-General of the United States Public Health Service, a citizen of the State of Virginia and is a resident of Washington in the District of Columbia.

The defendant John J. Tigert is United States Commissioner of Education, and is a citizen of the State of Kentucky and a resident of Washington in the District of Columbia.

Said three defendants Grace Abbott, Hugh S. Cumming and John J. Tigert, as Chief of the Children's Bureau, Surgeon-General of the United States Public Health Service, and United States Commissioner of Education, respectively, constitute the Board of Maternity and Infant Hygiene created by said Sheppard-Towner Act. By said Act

and as therein provided certain powers are conferred and certain duties are imposed upon said Board of Maternity and Infant Hygiene and said Children's Bureau, and said Children's Bureau is charged with the administration of the Act, except as therein otherwise provided.

II. This is a suit in equity arising under the Constitution
3 and laws of the United States, between the Plaintiff, a citizen of Massachusetts and the defendants, citizens of other States, who, as designated officials of the government of the United States, are given powers and charged with duties in the administration and enforcement of said Sheppard-Towner Act. The purpose of the suit is to restrain the defendants from exercising the powers purporting to be conferred and from performing the duties purporting to be imposed by said Act, on the ground that said Act is unconstitutional and void, and that the defendants are proceeding unlawfully, but under the alleged authority of said Act, to carry its provisions into effect, and to expend the public monies of the United States for that purpose, by all of which acts this Plaintiff is injured as a tax payer of the United States and as a citizen of the United States and of the State of Massachusetts.

III. (*a*) The 67th Congress of the United States of America, unlawfully assuming a power not delegated to it but reserved to the States and the people by the Tenth Amendment of the Constitution, passed an Act entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," and approved November 23, 1921, being the Sheppard-Towner Act, so-called, hereinabove referred to.

(*b*) Said Act purports to authorize the appropriation of $480,000 for the fiscal year, ending June 30, 1922, and $240,000 annually thereafter for the period of five years, and an additional sum of $1,000,000 for the fiscal year ending June 30, 1922, and not exceeding $1,000,000 annually thereafter for the period of five years,
4 said appropriations, after a deduction of not more than $50,000 per year for expenses of administration by the Children's Bureau, to be apportioned among the States as provided in said Act; but said Act purports to provide that in order to secure the benefit of said appropriations any State must accept the provisions thereof and submit plans for carrying out its provisions subject to the approval of the Board created by said Act, and in order to secure the benefits of said additional appropriations any State must appropriate equal amounts for the purposes of the Act. The Children's Bureau is charged with the administration of the Act and is authorized and empowered to co-operate in such administration with the different State agencies. Said State agencies are required to make such reports concerning their operations and expenses as may be prescribed by the said Children's Bureau, and said Children's Bureau is authorized, with the approval of the Board, whenever it is determined as to any State that federal or state funds have not been properly expended, to withhold the certificate authorizing payment to such State of the amount to which it is entitled.

(c) The Plaintiff is informed and believes and therefore avers that legislation by Congress, by which appropriations are made of the public funds of the United States to be paid for objects which are not national but entirely local, to those States which accept such appropriations and themselves appropriate equal amounts to be expended under the direction of some Federal Board, commonly designated "Federal Aid" legislation, has been found or is believed to be an effective means of inducing States to yield a portion of
5 their sovereign rights for the consideration offered, and bills of a similar nature, calling for the appropriation of immense sums of money in the manner described, are now pending or proposed in the Congress of the United States; that unless checked by this Court on the ground of unconstitutionality no limit can be foreseen to the amount which may be thus expended for matters which are of local concern and entirely and exclusively within the power and jurisdiction of the several States by statutes providing for the establishment of large Federal bureaus with many officers for the performance of duties which are entirely beyond any authority delegated to or conferred upon the United States by the Constitution.

(d) The Plaintiff is informed and believes and therefore avers that the burden of paying for the appropriation provided by said Sheppard-Towner Act and similar legislation falls unequally upon the different States and the tax payers therein; that the main sources of Federal revenue are internal revenue taxes, such as individual and corporate income taxes and inheritance tax; that the burden of these taxes rests very largely upon the industrial States such as Massachusetts; that approximately three-fourths of said taxes are collected from the following ten States; New York, Pennsylvania, Illinois, Ohio, Massachusetts, Michigan, California, Missouri, New Jersey and North Carolina, which, if they accepted the provisions of said
6 Sheppard-Towner Act, would get less than 35 per cent of the appropriations thereunder; that it has been estimated that 5.66 per cent of internal revenue taxes are paid by the citizens of Massachusetts; that if said State of Massachusetts should accept the Act it has been estimated that the return to it thereunder would be less than one-half the amount collected from its citizens, while if Massachusetts should not accept the Act its citizens would be taxed in order to carry the Act into effect in the other States. The Plaintiff avers that said Sheppard-Towner Act is a usurpation of a power not granted to Congress by the Constitution and an attempted exercise of the power of local self government reserved to the States by the Tenth Amendment; that Congress has not the power which it has attempted to assume to appropriate to the use of the States according to any method of apportionment revenues raised from the people of the United States for national purposes; that even more it has not the power to appropriate such revenues to those States alone which, by agreeing through their legislatures to accept such appropriations and to appropriate equal amounts, attempt to yield and surrender the sovereign rights of those States; that Congress cannot assume and the State legislatures cannot yield or surrender the powers reserved to the States by the Tenth Amendment; that such powers can only

be granted to the Federal government by an amendment proposed and ratified in the manner provided by Article 5 of the Constitution of the United States. Further that said Sheppard-Towner Act purports to legislate with respect to matters over which the Congress of the United States has no power and authority and which matters are wholly and exclusively within the jurisdiction of the several
7 States and within the powers reserved to them under the Tenth Amendment to the Federal Constitution. Moreover the said Act undertakes to delegate to the said Board of Maternity and Infant Hygiene and said Children's Bureau the power to legislate with respect to the subject matter mentioned in said Act, contrary to the provisions of the Constitution of the United States vesting the legislative power of the Federal Government in the Congress of the United States.

(*e*) Appropriations have been made by Congress, for carrying out the provisions of said Sheppard-Towner Act, of $490,000 for the fiscal year ending June 30, 1922, and $1,240,000 for the fiscal year ending June 30, 1923.

(*f*) The Plaintiff is informed and believes and therefore avers that pursuant to the provisions of said Sheppard-Towner Act, and in the administration and enforcement thereof, the following acts have been done by the defendants, or some of them, or under their direction:

(1) The Board of Maternity and Infant Hygiene created by the Act has organized and has elected the Chief of the Children's Bureau as its chairman.

(2) The Children's Bureau is engaged in making, or causing to be made, certain studies relating to the promotion of the efficient administration of the Act.

(3) The Children's Bureau has submitted estimates of the amounts necessary for administering the provisions of the Act through the Bureau of the Budget and the President to Congress, and appropriations have been made therefor as follows:
8 For the year ending June 30, 1922, estimate $50,000, appropriation $12,500.

For the year ending June 30, 1923, estimate $50,000, appropriation $50,000.

(4) The Children's Bureau has appointed three persons as assistants from the eligible lists of the Civil Service Commission, and has purchased some supplies and equipment.

(5) The Children's Bureau has certified to the Secretary of the Treasury the amount estimated by the Bureau to be necessary for administering the provisions of the Act, said estimates being as stated above.

(6) The Children's Bureau has certified to the Secretary of the Treasury and to the treasurers of the various States the amounts apportioned to each State for the fiscal years ending June 30, 1922, and June 30, 1923. It has caused to be prepared, and has published as Bureau Publication No. 95, a table of maximum annual amounts available to the States under the Sheppard-Towner Act.

(7) Detailed plans for carrying out the provisions of the Act have been submitted to the Children's Bureau by the following States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, Wyoming.

9 (8) The plans so submitted have been approved by the Board in all cases except that of Colorado.

(9) The Children's Bureau has certified to the Secretary of the Treasury the amount to which the States is entitled under the provisions of the Act in the following cases: Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, Wyoming.

(10) Payments have been made upon the certificates so issued to the States or certain of the States holding said certificates, but the Plaintiff is not informed as to the amounts so paid.

(11) Forms of reports concerning the operations and expenditures of State agencies have been prepared and prescribed by the Children's Bureau.

(*g*) A bill providing in substance that the Commonwealth of Massachusetts should accept the provisions of said Act and that the State Department of Public Health should co-operate with the Federal Board in the administration thereof was presented in the General Court in the Session of 1922, but said bill was not passed by the Legislature.

(*h*) The Plaintiff avers that her rights, as a citizen of the United States and of the State of Massachusetts, have been invaded and violated by the expenditures and other acts hereinbefore alleged

10 purporting to have been made and performed in pursuance of said Sheppard-Towner Act. That her constitutional rights to have taxes levied and assessed against her by the United States for those purposes alone for which the Constitution of the United States provides and to have the taxes paid by her to the United States appropriated by the Congress of the United States in the manner provided by the Constitution have been infringed and violated; and the plaintiff is advised and, therefore avers that the said alleged act of Congress and the attempted appropriation of public money therein, constitutes a deprivation and taking of the plaintiff's property without due process of law, contrary to the Fifth Amendment of the Constitution of the United States and is, therefore, null and void.

Wherefore the plaintiff prays that said Sheppard-Towner Act be declared unconstitutional and void, and that the Defendants and their assistants, agents and servants be enjoined and restrained from acting or proceeding under the alleged authority of said Act to carry

its provisions into effect, or to expend the public monies for that purpose, and that the Plaintiff may have such other and further relief as to this Court may seem just and equitable.

HARRIET A. FROTHINGHAM.

WILLIAM L. RAWLS.
GEORGE ARNOLD FRICK.
W. H. LAMAR.

Harriet A. Frothingham, Plaintiff, in the foregoing Bill of Complaint, being duly sworn on oath says that she read the foregoing Bill of Complaint by her subscribed and that the matters and things therein stated by her as true are true and that those stated on information and belief, she verily believes to be true.

HARRIET A. FROTHINGHAM.

11 Subscribed and sworn to before me, a Notary Public, in and for the City of Boston, State of Massachusetts, this 13th day of December, 1922.

RANDOLPH FROTHINGHAM. [SEAL.]

My Commission Expires Dec. 15, 1922.

Amendment to Bill of Complaint.

Filed January 18, 1923.

* * * * * * *

Now comes the Plaintiff by her Attorneys, leave of the Court first had and obtained, and amends her bill of complaint by adding a new paragraph after the 3rd (*h*) paragraph on page 9 of the original bill of complaint reading as follows:

"The Plaintiff, by reason of the premises is without adequate remedy at law and unless relief is granted by the Court, as herein prayed, she will suffer irreparable damage; that all and singular the damage resulting from the said acts of the defendants will be incapable of admeasurements and adjudication at law."

W. H. LAMAR,
WM. L. RAWLES,
GEO. ARNOLD FRICK,
Attorneys for Plaintiff.

Fiat.

Leave to file the within amendment granted.

WALTER I. McCOY,
Justice.

12 *Motion to Dismiss.*

Filed February 8, 1923.

* * * * * * *

Now come the defendants, Andrew W. Mellon, Secretary of the Treasury; Grace Abbott, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon General of the Public Health Service; and John J. Tigert, Commissioner of Education, by and through their attorney, Peyton Gordon, United States Attorney in and for the District of Columbia, and move to dismiss the bill of complaint in the above-entitled cause on the following grounds:

1. That this suit is in effect one against the United States, to which it is not a party and in which it has not consented to be sued.
2. That the bill of complaint alleges no facts which, if true, would entitle the plaintiff to the relief prayed.
3. That the bill of complaint is without equity.

PEYTON GORDON,
United States Attorney.

Memorandum.

Filed February 16, 1923.

* * * * * * *

A court should not decide that a statute is unconstitutional unless it be clearly so. This is true especially of a trial court presided over by a single judge who has no opportunity for responsible con-
13 sultation such as is had in courts of appeal.

Congress is the body which in the first instance has the duty of deciding whether a proposed law may be constitutionally enacted and it has made many appropriations apparently under the general welfare clause. This fact alone raises a doubt sufficient to lead to a decision that the demurrers here should be sustained until a more critical examination of that legislation on an appeal.

Motions to dismiss granted.

WALTER I. McCOY,
Chief Justice.

Final Decree.

Filed February 19, 1923.

* * * * * * *

This cause coming on to be heard on the bill of complaint and the amendment thereto, and the defendants' motion to dismiss the bill of complaint, and the same having been argued by counsel and consid-

ered by the Court, and the said motion to dismiss having been sustained, with leave to the plaintiff to amend the bill of complaint, and the said plaintiff having elected, in open court, to stand upon her said bill of complaint and not to amend the same; it is, by the Court, this 19th day of February, 1923,

Adjudged, ordered and decreed that the bill of complaint herein be, and the same is hereby, dismissed.

By the court: WALTER I. McCOY,
Chief Justice.

From the foregoing decree plaintiff, in open court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of bonds for costs is fixed at one hundred dollars, or, in lieu
14 thereof, a cash deposit of fifty dollars.

By the court:

WALTER I. McCOY,
Chief Justice.

Memorandum.

February 19, 1923.—$50 deposited in lieu of penalty of bond for costs on appeal.

Assignments of Error.

Filed February 20, 1923.

* * * * * * *

Now comes the plaintiff by her attorneys and files the following Assig-ments of Error:

First. The Court erred in dismissing the bill of complaint with costs.

Second. The Court erred in holding that the act of Congress, mentioned in said bill of complaint, namely, the Sheppard-Towner Act, was constitutional and valid and also erred in refusing to grant the relief prayed in said bill of complaint.

Third. Because the court thereby sustains a violation of the rights of the plaintiff under the Constitution of the United States.

WILLIAM L. RAWLES,
GEORGE ARNOLD FRICK,
WILLIAM H. LAMAR,
Attorneys for Plaintiff.

15 *Designation of Record.*

Filed February 20, 1923.

The Clerk of the said Court will prepare the record on appeal herein and include therein,

(1) The Bill of Complaint.
(2) The amendment of the Bill of Complaint.

(3) The Motion to Dismiss.
(4) Memorandum by the Court.
(5) Order of February 19, 1923, granting the motion to dismiss, and dismissing the bill of complaint and note of appeal.
(6) Memorandum of deposit of $50.00 with the clerk in lieu of penalty of bond for costs.
(7) Assignments of Error.
(8) This order.

WILLIAM L. RAWLES,
GEORGE ARNOLD FRICK,
WILLIAM H. LAMAR,
Attorneys for Plaintiff.

Service of copy admitted February 20, 1923.
I consent.

VERNON E. WEST,
Asst. Attorney of the United States in and for the District of Columbia.

16 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 40788 in Equity, wherein Harriet A. Frothingham is Plaintiff and Andrew W. Mellon, Secretary of the Treasury et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 23rd day of February, 1923.

[Seal of the Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

Endorsed on cover: District of Columbia Supreme Court. No. 3967. Harriet A. Frothingham, appellant, vs. Andrew Mellon, Secretary, et al. Court of Appeals, District of Columbia. Filed Feb. 23, 1923. Henry W. Hodges, clerk.

In Court of Appeals of District of Columbia.

Friday, March 16th, A. D. 1923.

* * * * * * *

[Title omitted.]

Submission of Cause.

The above entitled cause was submitted to the consideration of the Court on the printed record and briefs filed herein by Messrs. W. H. Lamar and L. Q. C. Lamar, attorneys for the appellant, and by Messrs. Peyton Gordon and Vernon E. West, attorneys for the appellees.

In the Court of Appeals of the District of Columbia.

[Title omitted.]

Before Smyth, Chief Justice, and Robb and Van Orsdel, Associate Justices.

Memorandum Opinion by Chief Justice Smyth.

This is a suit based on the assumption that the Act of Congress approved November 23, 1921, and otherwise known as the Maternity Bill, is an unwarranted exercise of power by Congress. An injunction was sought to restrain the appellees from enforcing the act. The court of first instance sustained a motion to dismiss the bill.

Pending in the Supreme Court of the United States is another case that involves the same question, which is set for hearing in that court on the 9th day of April next. Counsel suggest that there is doubt as to the jurisdiction of the court to entertain it. Both cases, it is said, involve a matter of great public interest which should be adjudicated at an early date. For these reasons the Department of Justice, representing the appellees, the appellant concurring, has asked the court to expedite the disposition of this case so that an appeal from our decision may be lodged in the Supreme Court of the United States in time to be argued and submitted with the other case.

If we take the necessary time after oral arguments and submission to properly consider the case on the merits and write an opinion such as would reflect our best judgment, the cause would not be docketed in the Supreme Court in time to be heard with the other case. While the government is not entitled to any privilege in the courts so far as the merits of a controversy between it and a citizen are concerned, when a showing is made by the Department of Justice, such as we have here, that public policy requires the advancement of a cause, and the other party joins in the showing, we think it not improper to grant the request. For the course we take there is au-

thority in New et al. vs. Wilson, decided by the District Court of the United States for the Western Division of the Western District of Missouri. The opinion of Circuit Judge Hook, who spoke for the court, is not reported, but appears in the transcript of the record in Wilson vs. New, 243 U. S. 332. See also the decision of the Supreme Court of the United States in Crown Die and Tool Company vs. Nye Tool and Machine Works, decided February 19, 1923. Consequently we hold pro forma that the decree should be affirmed, and it is so ordered, the costs to be assessed against the appellant.

Wednesday, March 21, A. D. 1923.

* * * * * * *

[Title omitted.]

Decree.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby affirmed with costs. Per Mr. Chief Justice Smyth, March 21, 1923.

In the Court of Appeals of the District of Columbia.

[Title omitted.]

Petition for Appeal.

[Filed Mar. 23, 1923.]

Motion for the Allowance of an Appeal to Remove the Above-entitled Cause to the Supreme Court of the United States.

Now comes the Appellant, Harriet A. Frothingham, by and through her attorneys, William H. Lamar and Lucius Q. C. Lamar, Esquires, and moves the Court for the allowance of an appeal to remove the above-entitled cause to the Supreme Court of the United States and to fix the bond at $300 to operate as a supersedeas for that

1. This case involves the construction and application of the Constitution of the United States and the constitutionality of a law of the United States.

2. This case draws in question the validity of an authority exercised under the United States, and the existence and scope of a power or duty of an officer of the United States. William H. Lamar, Lucius Q. C. Lamar, Attorneys for Appellant.

I consent to immediate consideration of above motion. Vernon E. West, Assistant United States Attorney.

[File endorsement omitted.]

In the Court of Appeals of the District of Columbia.

[Title omitted.]

Assignments of Error.

[Filed Mar. 23, 1923.]

Now comes Harriet A. Frothingham, the appellant—plaintiff in error—and assigns as error the following:

First. That the Court erred in affirming the decree of the Supreme Court of the District of Columbia entered in this cause.

Second. That the Court erred in not reversing the said decree.

Third. That the Court erred in holding that the bill of complaint herein should be dismissed.

Fourth. That the Court erred in holding that the Act of Congress mentioned in said bill of complaint, namely, the Sheppard-Towner Act, was constitutional and valid.

Fifth. That the Court erred in not holding that appellant—plaintiff in error—is not entitled to the relief prayed in her bill of complaint.

Sixth. Because the Court sustained a violation of the rights of the appellant—plaintiff in error—under the Constitution of the United States. William H. Lamar, Lucius Q. C. Lamar, Attorneys for the appellant, plaintiff in error.

[File endorsement omitted.]

Saturday, March 24, A. D. 1923.

* * * * * * *

[Title omitted.]

Order Allowing Appeal, etc.

On consideration of the motion for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, It is ordered that said appeal be and the same is hereby allowed, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

Bond on Appeal.

[Filed Mar. 27, 1923.]

Know all men by these presents, That we, Harriet A. Frothingham, as principal, and Fidelity and Deposit Company of Maryland,

as surety, are held and firmly bound unto Andrew W. Mellon, Secretary of the Treasury; Grace *Grace* Abbott, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon-General of the Public Health Service; John J. Tigert, Commissioner of Education, in the full and just sum of Three hundred dollars, to be paid to the said Andrew W. Mellon, Secretary of the Treasury; Grace Abbott, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon-General of the Public Health Service; John J. Tigert, Commissioner of Education, there certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 26th day of March, in the year of our Lord one thousand nine hundred and twenty-three.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Harriett A. Frothingham, Plaintiff, vs. Grace Abbott, Chief of the Children's Bureau of the Department of Labor; Andrew W. Mellon, Secretary of the Treasury; Hugh S. Cumming, Surgeon-General of the Public Health Service; John J. Tigert, Commissioner of Education, Defendants, a decree was rendered against the said Harriett A. Frothingham and the said Harriett A. Frothingham having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Andrew W. Mellon, et al. citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Harriett A. Frothingham shall prosecute said appeal to effect, and answer all damages and costs if plaintiff fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue. Harriet A. Frothingham, by Lucius Q. C. Lamar, Attorney. (Seal.) Fidelity and Deposit Company of Maryland, by William M. Kroll, Attorney-in-fact. (Seal.) Seal of the Fidelity and Deposit Company of Maryland.) Sealed and delivered in presence of Elenore P. Faust.

Approved by Constantine J. Smyth, Chief Justice Court of Appeals of the District of Columbia.

[File endorsement omitted.]

Citation and Service.

[Filed Mar. 27, 1923.]

UNITED STATES OF AMERICA, *ss:*

To Andrew W. Mellon, Secretary of the Treasury; Grace Abbott, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon-General of the Public Health Service, et al., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Harriet A. Frothingham is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 27th day of March, in the year of our Lord one thousand nine hundred and twenty-three. Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 27th day of March, 1923. Vernon E. West, Counsel for Appellees.

[File endorsement omitted.]

In the Court of Appeals of the District of Columbia.

[Title omitted.]

Designation of Record.

[Filed Mar. 27, 1923.]

The Clerk, in the preparation of the transcript of record on appeal to the Supreme Court of the United States, will please include the following papers:

1. Transcript of record.
2. Submission of cause.
3. Opinion.
4. Decree.
5. Motion for appeal.
6. Assignment of error.
7. Order allowing appeal.

8. Bond.
9. Citation.
10. This designation.

William H. Lamar, Lucius Q. C. Lamar, Attorneys for the Appellant.

[File endorsement omitted.]

Clerk's Certificate.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 24, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of Harriet A. Frothingham, Appellant, vs. Andrew W. Mellon, Secretary of the Treasury; Grace Abbott, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon-General of the Public Health Service, et al., No. 3967, January term, 1923, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of March, A. D. 1923. Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia. [Seal of the Court of Appeals, District of Columbia.]

Endorsed on cover: File No. 29,512. District of Columbia Court of Appeals. Term No. 962. Harriet A. Frothingham, appellant, vs. Andrew W. Mellon, Secretary of the Treasury; Grace Abbott, Chief of the Children's Bureau of the Department of Labor; Hugh S. Cumming, Surgeon General of the Public Health Service, et al. Filed April 2nd, 1923. File No. 29,512.

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NO. 962. OCTOBER TERM, 1922.

IN THE

Supreme Court of the United States

HARRIET A. FROTHINGHAM, Appellant,

v.

ANDREW W. MELLON, SECRETARY OF THE TREASURY; GRACE ABBOT, CHIEF OF THE CHILDREN'S BUREAU OF THE DEPARTMENT OF LABOR; HUGH S. CUMMING, SURGEON-GENERAL OF THE PUBLIC HEALTH SERVICE; JOHN J. TIGERT, COMMISSIONER OF EDUCATION.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLANT.

WILLIAM L. RAWLS,
GEORGE ARNOLD FRICK,
WILLIAM H. LAMAR,
Counsel for Appellant.

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was brought to test the constitutionality of the Act of Congress approved November 23, 1921, entitled "An Act for the promotion of the welfare and hygiene of maternity and infancy, and other purposes." (See Appendix A.) It is commonly known as the Sheppard-Towner Act and is hereinafter so referred to. It purports to authorize the appropriation of $480,000 for the fiscal year ending June 30, 1922, and $240,000 annually thereafter for the period of five years;

and an additional sum of $1,000,000 for the fiscal year ending June 30, 1922, and not exceeding $1,000,000 annually thereafter for the period of five years; said appropriation, after a deduction of not more than $50,000 a year for expenses of administration, to be apportioned among the States in the manner provided in Section 2, for the purpose of *co-operating* with the several States in promoting the welfare of maternity and infancy as provided in the Act (Sec. 1).

In order to secure the benefit of these appropriations, any State must accept the provisions of the Act and submit plans for carrying them out, which plans must be approved by the Board of Maternity and Infant Hygiene, created by the Act; and in order to secure the benefits of the so-called additional appropriations, such State must appropriate an amount equal to that allotted to it under the Act (Secs. 4, 8).

The Children's Bureau of the Department of Labor is charged with the administration of the Act and is authorized and empowered *to co-operate* in such administration with the different State agencies. Certain powers are conferred, and certain duties are imposed upon the Board of Maternity and Infant Hygiene, with reference to the administration of the Act (Sec. 3).

The State agencies are required to make such reports concerning their operations and expenses as may be prescribed by the Children's Bureau, and this Bureau is authorized, with the approval of the Board of Maternity and Infant Hygiene, whenever it is determined as to any State, that Federal or State funds have not been

properly expended, to withhold the certificate authorizing payment to such State of the amount to which it would otherwise be entitled (Sec. 11).

The plan of the Act is unique. Only *a topic* of legislation is mentioned, viz: The Promotion of the Welfare and Hygiene of Maternity and Infancy—and power is given to the Board created by the Act to formulate a plan of action with respect to this topic. Aside from this general and indefinite purpose and the direction to pay certain expenses of administration, there is no specification whatever in the Act of the objects to which the money authorized to be appropriated is to be applied. The scheme of the Act, however, is plain enough. Certain State agencies are authorized to agree with the Children's Bureau and the Board of Maternity and Infant Hygiene, upon a plan of operation, and as a result of this agreement such State agencies are to receive contributions out of the money authorized to be appropriated by the Act for the purpose of carrying out the plan so agreed upon. It is made the business of the Board to see that the money obtained from the Federal Government, as well as that appropriated by the State Government, is used in carrying out the plans agreed upon between the State agency and the Federal officials. If this is not done, power is given to the Board to prevent any further payments out of the Federal treasury to such State. It is manifest, therefore, that the Act is an attempt by means of donations or contributions out of the Federal treasury to induce the States to subordinate or surrender their exclusive and undoubted power with respect to the subject-matter of this Act, to the control of a Bureau of the Federal Government.

The bill of complaint in this case was filed in the Supreme Court of the District of Columbia, in Equity, by Harriet A. Frothingham, a citizen of the State of Massachusetts and of the United States and a taxpayer of the United States, against the appellees to enjoin them from carrying out the provisions of the so-called Sheppard-Towner Act, and to restrain and enjoin the payment of any money out of the Federal treasury for the purposes thereof, upon the ground that the same is unconstitutional, null and void. The appellees are the Secretary of the Treasury and the Federal officials who are charged with the administration of the Act.

Briefly stated, the appellant's contention as set forth in the bill is, that the matter of the promotion of the welfare and hygiene of maternity and infancy is one exclusively within the power and jurisdiction of the several States, and the Congress of the United States is without any constitutional power or authority to legislate with regard thereto or to appropriate any money from the Federal treasury for such a purpose.

A motion to dismiss the bill of complaint was filed by the appellees upon the grounds substantially that the Court was without jurisdiction to entertain the same, and further that it did not contain any allegations entitling the plaintiff to relief in a Court of Equity. This motion was sustained. The case was then taken to the Court of Appeals of the District of Columbia which affirmed the decree of the lower Court, hence the appeal to this Court.

JURISDICTION.

The Right of the Appellant to Maintain This Suit.

It has been held with practical uniformity by the Courts of the various States that a taxpayer has a sufficient interest to entitle him to maintain a suit against a public officer for the purpose of enjoining an unauthorized payment of public funds or disposition of public property. *Cooley on Taxation,* II, 1435, and *Dillon on Municipal Corporations,* IV, §1579, p. 2763.

This right of a taxpayer to enjoin such action on the part of a State or municipal officer has been recognized by this Court. *Crampton v. Zabriski,* 101 U. S. 601, 609; *Brown v. Trusdale,* 138 U. S. 389; *Colvin v. Jacksonville,* 158 U. S. 456; *Ogden City v. Armstrong,* 168 U. S. 224, 236. In a very recent case, *Hawk v. Smith No. 1,* 253 U. S. 221, 224, a most important constitutional question was decided by this Court in a suit brought by a taxpayer against the Secretary of State of Ohio to enjoin him from spending the public money in preparing and printing forms of ballots for the submission of a referendum to the electors of that State on the question of the ratification which the General Assembly had made of the proposed Eighteenth Amendment of the Federal Constitution.

This Court has in other cases permitted a proceeding to be maintained by one of a large class affected by a law alleged to be invalid, for the purpose of enjoining a public officer from executing it. In *Hammer v. Dagenhart,* 247 U. S. 251, the suit was brought by a father of

infant children to enjoin the prosecution by the United States Attorney of the employer of the infants for an alleged violation of the Child Labor Law, arising out of their employment. The interest of the plaintiff in that case was nothing like as direct as that of the plaintiff in the instant case. See also *Traux v. Raich*, 239 U. S. 33.

In *Millard v. Roberts*, 202 U. S. 429, this Court gave careful consideration to a proceeding brought by a taxpayer of the District of Columbia to enjoin the Treasurer of the United States from making payments to railroad corporations under certain Acts of Congress providing for the erection of the present Union Station in the City of Washington—a great national improvement—upon the alleged ground that there was no authority vested in Congress to devote monies in the national treasury to private purposes. The case was disposed of upon its merits after full consideration of the allegations of the bill. These manifestly presented no ground for the interposition of a court of equity, the expenditures in question being within the power of Congress to authorize under several of its enumerated powers, particularly the power to exercise jurisdiction over the District of Columbia. The fact that the Court gave such serious consideration to the bill in that case upon its merits, plainly indicates that it desired to refrain from disposing of the case upon the grou that a taxpayer had no standing in Court, although . . is true that in the last sentence of the opinion it is stated that this had been assumed, but the Court did "not wish to be understood as so deciding" (p. 438).

The case of *Wilson v. Shaw*, 204 U. S. 24, has no application to the present case. *It was not a taxpayer's suit.* The plaintiff merely alleged that he was "a citizen of Illinois and the owner of property subject to taxation by the United States." Nevertheless, the Court entered into a careful review of the allegations of the bill, which was brought to restrain the payment of money from the Treasury of the United States for the construction of the Panama Canal. Obviously no case was presented of any unauthorized action on the part of the Government, as the Court readily determined, but the case emphasizes the caution of the Court in refusing jurisdiction in cases where there is an appropriation of public funds alleged to be unwarranted by law.

The present proceeding was instituted in the Supreme Court of the District of Columbia. The right of a taxpayer to maintain a suit to enjoin an alleged unauthorized payment of public monies from the Treasury of the United States had been expressly adjudicated by the Court of Appeals of the District. *Roberts v. Bradfield*, 12 App. Cases (D. C.) 453, 459, 460. There the suit was brought for the purpose of enjoining Roberts, the Treasurer of the United States, from paying out money in pursuance of an alleged contract made by the Commissioners of the District of Columbia which the plaintiff, Bradfield, contended was illegal and void. The decision of the Court of Appeals in favor of the right of a taxpayer to maintain a suit in such a case was based upon the decision of this Court in *Crampton v. Zabriski, supra*, and other decisions above cited. *Roberts v. Bradfield* came upon appeal to this Court and was decided upon its

merits, the question of the right of a taxpayer to maintain such a suit not being discussed. 175 U. S. 291.

It is submitted that there is no distinction, so far as the right of a taxpayer to maintain a suit is concerned, between an officer of a State who is about to make an unauthorized expenditure of public money and an officer of the Federal Government who threatens to do the same thing. Both are subject to the law and must find valid authority for all of their acts. In so far as they exceed the authority conferred upon them, their acts are void.

This principle is of uniform application, for, as declared by the Supreme Court of Pennsylvania in *Mott v. Pennsylvania R. R. Co.*, 30 Pa. St. 9:

> "In such a case no individual in the land, however high in power, can claim to be above the law * * *. And if it be shown that the Act under which he claims authority to dispose of public property or to divest private rights is unconstitutional and void he may, of course, like any other individual be restrained from proceeding."

This Court in numerous decisions has laid down the rule that all Governmental officers or agencies are subject to judicial restraint where they attempt to act in excess of authority. *Osborn v. U. S. Bank*, 9 Wheat. 739; *Board of Liquidation v. McComb*, 92 U. S. 531, 541; *United States v. Lee*, 106 U. S. 196, 212, 215; *Virginia Coupon Cases* (Opinion in *Allen v. B. & O. R. R. Co.*), 114 U. S. 311, 314, 315, 316; *Pennoyer v. McConnaughy*, 140 U. S. 1; *Scott v. Donald*, 165 U. S. 107, 112; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362;

Smyth v. Ames, 169 U. S. 466; *Ex Parte Young,* 209 U. S. 123.

Likewise where a sufficient interest in the plaintiff has been shown, this Court has always recognized his right to maintain a suit to enjoin the head of a department of the Federal Government from committing an unauthorized act to the plaintiff's injury.

In *Noble v. Union River Logging R. R.,* 147 U. S. 165, 171, 172, where a proceeding was brought to enjoin the Secretary of the Interior from annulling the action of his predecessor, which action operated to give effect to a grant of public lands to the plaintiff, this Court, after reviewing a number of prior decisions, said:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires,* and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of Liquidation v. McComb,* 92 U. S. 531, 541: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases the writ of *mandamus* and injunction are somewhat correlative to each other.' "

In *Philadelphia Co. v. Stimson, Secretary of War*, 223 U. S. 605, 619, the same principle was announced:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded * * *. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunctive process. The principle has frequently been applied with respect to State officers seeking to enforce unconstitutional enactments * * *. *And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.*"

The appellant maintains that the so-called Sheppard-Towner Act is null and void because it is in violation of the Constitution of the United States and no authority is conferred thereby upon the Secretary of the Treasury to make any of the payments mentioned therein. If these payments are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay her proportionate part of such unauthorized payments. She, therefore, has an interest sufficient under the practically uniform decisions of the Courts of this country to enable her to maintain a proceeding to enjoin the making of these payments. Her relation to these funds is exactly that of a *cestui que trust* to funds held by his trustee. Her injury would be irreparable because it cannot be calculated. She can resort only to equity to maintain her right.

The Proper Parties Are Before the Court.

It is contended by appellees that all of the States that have accepted the provisions of the Sheppard-Towner

Act should have been made parties defendant in this case. It is submitted that such a contention is without merit. Every right which the plaintiff here asserts may be fully adjudicated and determined by this Court in the proceeding as it now stands. It is entirely unnecessary to ask any relief against any parties other than those who are now before the Court. A full and complete remedy can be given without the presence of those who are mere beneficiaries or supposed beneficiaries of the Act. The appellant maintains that the appellees are about to pay or direct to be paid out of the Treasury of the United States certain funds in pursuance of an Act which has no valid existence, because no authority to enact it is found in the Constitution of the United States. *It is this specific action on the part of the appellees with which the appellant is concerned.* She is asking for no remedy with respect to anything which has already been done. The relief which she prays is with respect to specific acts which appellees are about to do and have threatened to do, and from which irreparable injury will result to her.

The authorities upon this question would seem to leave no doubt upon the point that adequate and full relief may be granted in this case in the absence of those States that have accepted the provisions of the Act. The numerous decisions of this Court holding that a State is not a necessary or indispensible party to a proceeding brought to restrain one of its officers from carrying out some mandate of the State alleged to be in excess of State authority, are controlling in the instant case. Although an officer is acting admittedly in pursuance of an

explicit direction of a State legislature, and although it has always been recognized that the State in such case *has a direct interest in the proceeding*, this has not prevented the granting of relief to the individual plaintiff threatened with injury, although the State was not before the Court and could not, without its consent, be made a party to the proceeding.

The case of *Osborn v. United States Bank, supra*, is a striking illustration of this principle. There, officers of the State had taken, under authority from the Legislature of Ohio, certain property of the Bank of the United States in payment of an alleged tax imposed by the State, the validity of which the bank contested in a proceeding in which the State officers who were in possession of the property were made defendants. Upon the question as to whether or not this tax was validly imposed, the State obviously was directly and mainly concerned. The argument was pressed upon behalf of the defendants, that the State was an indispensable party to the proceeding and the question as to the validity of the tax and the authority of its officers to collect it could not be decided when the State was not before the Court. But this Court held that the State of Ohio, although directly interested, could not be made a party *without ousting the jurisdiction of the Court* and as a specific remedy was asked against the individual officers to prevent their committing a specific and definite act claimed to be in violation of the Constitution of the United States, the Court ought to proceed and could proceed in the absence of the State. (9 Wheat. 841, 842, 843.)

In many other cases exactly the same rule has been followed. *Board of Liquidation v. McComb,* 92 U. S. 531; *Reagan v. U. S.,* 154 U. S. 362, 390; *Smyth v. Ames,* 169 U. S. 466; *Ex Parte Young,* 209 U. S. 123; *Truax v. Raich,* 239 U. S. 33; *Ervien v. United States,* 251 U. S. 41, 45.

The same principle has been applied by this Court in cases involving the validity of Federal taxes. In *Pollock v. Farmers Loan & Trust Co.,* 157 U. S. 553, 554, the validity of the Income Tax Act of 1894 was determined in a suit brought by a stockholder of a corporation to enjoin it from paying the taxes imposed upon it, upon the ground that, as the Act imposing these taxes was invalid, such a payment by the corporation would be an unauthorized and unlawful application of the corporate property. The taxes had been imposed by the Congress of the United States. They were to be paid to the Government of the United States. The Government, therefore, had a vital interest in the determination of the question as to whether or not the law imposing them was valid. It, however, was not a party to the proceeding and could not be made a party to it. There was a statute of the United States expressly forbidding the maintenance of any suit "for the purpose of restraining the assessment or collection of any tax." *Rev. Stat.* §3224. Although the Attorney General of the United States took part in the argument of the case in this Court, this did not in any sense make the Government a party to the proceeding, for, as this Court held in *Stanley v. Schwalby,* 162 U. S. 255, 270:

> "Neither the Secretary of War nor the Attorney General nor any subordinate of either has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the Court in a suit brought against their officers."

The Attorney General, therefore, had no authority to submit the rights of the United States to determination in a case between private parties. Nevertheless, this Court, although its jurisdiction was, at the time, vigorously denied by two of the dissenting Justices (Mr. Justice White, 157 U. S. 609, 613; Mr. Justice Harlan, Ib. 653) did determine the constitutional question in that case in the absence of the Government of the United States as a party to the proceeding.

Again, in *Flint v. Stone Tracy Co.*, 220 U. S. 108, and the series of cases involving the validity of the Federal Corporation Tax of 1909, the question was determined in proceedings like that in *Pollock v. Farmers Loan & Trust Co., supra.*

Later still in *Brushaber v. Union Pac. R. R. Co.*, 240 U. S. 1, the ruling in *Pollock v. Farmers Loan & Trust Co., supra,* was explicitly reaffirmed. See also *Smith v. Kansas City Title Co.*, 255 U. S. 180, 200.

The mere fact that there are persons who are interested in the determination of the same question does not control the point as to whether the relief asked in a particular case may be granted without making such persons parties to the proceeding. There may be numberless persons who are concerned or interested in uphold-

ing the constitutionality of a particular Act of Congress, who, under no stretch of the rules of equitable procedure, are to be regarded as indispensable parties to the proceeding where that question is involved.

Another illustration is the case of *Wilson v. New*, 243 U. S. 332, which involved the validity of the Act of Congress commonly known as the Adamson Act regulating the hours of labor of employees of railroads engaged in interstate commerce. Every employee of the railroads affected by the Act was directly and immediately interested in the question as to whether or not it was a valid enactment, but the only defendant in that case was a United States Attorney who had threatened to commence a criminal proceeding against the plaintiff. A bill of complaint was filed to enjoin him from instituting such proceeding for and on account of an alleged violation of the Act whose valdiity was challenged, and in that proceeding the question was determined. See also *Hammer v. Dagenhart*, 247 U. S. 251, 268; *Truax v. Raich* 239 U. S. 33. It is submitted that the above decisions clearly settle the proposition that where the purpose of the bill of complaint is to restrain *a specific unauthorized act of certain officers of the Government* the issue is one which can be fully and completely determined without the presence of any other party defendant than the officers whose unauthorized acts will occasion injury to the plaintiff.

Appellees rely upon *Texas v. Interstate Commerce Commission*, 258 U. S. 1; but it is submitted that that decision has no application to the instant case. The

bill filed by the State of Texas there sought to invalidate a number of decisions of the Interstate Commerce Commission and the Railroad Labor Bureau, and to affect directly relations between carriers and their employees. The bill in the present case asked for no such relief. It is directed at specific acts of the appellees, which appellant alleges are unauthorized because the legislation in pursuance of which these acts will be done is unconstitutional and void.

It will be observed, further, that this Court in *Texas v. Interstate Commerce Commission, supra*, distinguished the case of a general attempt to affect relations between other parties from one where the property interests of the State were directly involved (pp. 164-165). Here the plaintiff is seeking to protect what, under the decisions is a property interest, from the exercise of acts of officers of the Government alleged to be without valid authority.

PROPOSITIONS.

The appellant contends:

I. THAT THE SO-CALLED SHEPPARD-TOWNER ACT IS INVALID BECAUSE IT ATTEMPTS TO AUTHORIZE THE APPROPRIATION OF MONEY OUT OF THE TREASURY OF THE UNITED STATES FOR PURPOSES WHOLLY OUTSIDE OF ANY AUTHORITY OR POWER CONFERRED UPON THE GOVERNMENT OF THE UNITED STATES BY THE CONSTITUTION.

II. THAT GRANTING, FOR THE SAKE OF THE ARGUMENT, THAT CONGRESS HAD THE POWER TO APPROPRIATE MONEY OUT OF THE TREASURY OF THE UNITED STATES FOR THE PURPOSE SPECIFIED THEREIN, THE ACT IS STILL UNCONSTITUTIONAL AND VOID BECAUSE ITS PROVISIONS GO BEYOND THE EXERCISE OF SUCH POWER OF APPROPRIATION AND CONSTITUTE SUBSTANTIVE LEGISLATION WITH RESPECT TO MATTERS MANIFESTLY BEYOND THE LEGISLATIVE POWER CONFERRED UPON THE CONGRESS OF THE UNITED STATES BY THE CONSTITUTION.

III. THAT THE ACT IS INVALID BECAUSE IT AMOUNTS TO A DELEGATION TO A SUBORDINATE AGENCY BY CONGRESS OF LEGISLATIVE POWER IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

I.

It is asserted that the power of Congress to pass the Act here assailed is found in the first clause of Section 8 of Article I of the Constitution, which provides

> "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; and all duties, imposts and excises shall be uniform throughout the United States."

This contention is not based upon any supposed power in the Congress *to legislate* with respect to the subject-matter of the Sheppard-Towner Act, but is limited to the

assertion of its power *to appropriate money* for that purpose.

The notion that the clause under consideration confers a substantive power of legislation with respect to the so-called general welfare, while suggested from time to time in loose political discussion, has never received the sanction of any respectable authority, but, upon the contrary, has been repudiated and denied by every commentator upon the Constitution.

It has also been expressly repudiated by this Court.

In *Kansas v. Colorado*, 206 U. S. 89, 91, in discussing the purpose of the Tenth Amendment, this Court said:

> "This amendment was seemingly adopted with prescience of just such contention as the present, it disclosed the widespread fear that the National Government *might under the pressure of a supposed general welfare attempt to exercise powers which had not been granted.* With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act."

But it is unnecessary here to discuss further the question of any supposed power of Congress to legislate for the general welfare, because it is understood that appellees are not basing their argument in support of the validity of this Act upon any such ground. It is sufficient to refer to the discussions of the question in the commentaries upon the Constitution, all of which, as we have said, deny the existence of any such power. *Story on the Constitution*, Section 907; *Tucker on the*

Constitution, page 477; *Willoughby on the Constitution*, pages 39 and 40; *Miller on the Constitution*, page 229; *Hare on American Constitutional Law*, Vol. I, pages 242-243; *Von Holst on Constitutional Law*, page 118.

It is sought to find justification for this legislation by saying that Congress is specifically given the power to lay and collect taxes, duties, imposts and excises for the purpose of paying the debts and providing for the common defense and general welfare of the United States and accordingly whatever is related to the common defense and general welfare affords a proper use and application of the revenues raised by the exertion of the taxing power conferred. The appellees further assert that the terms "common defense" and "general welfare" are not limited or restricted by those enumerated powers of the Constitution which make provision for the common defense and general welfare of the United States, but their significance is to be determined independently of a consideration of the other provisions of the Constitution.

It is important, therefore, to remember that the contention advanced in support of this construction of these terms admits that the power of Congress respecting the general welfare thus defined is limited *to the naked and bare power of appropriating money*—that is to say, Congress may provide for the general welfare by *appropriating money*, but can do nothing beyond making the appropriation.

The appellant, upon the other hand, maintains that this method of construction is at war with the very nature

of the Constitution and with the fundamental conception out of which it sprang. It would give to the Federal Government an absolute and unrestrained power of appropriating money for purposes over which it has no vestige of control or authority. It amounts to the assertion of a power to give away money without any authority to make effective the purpose for which the money is appropriated.

The Government of the United States is a government of enumerated powers. It has only those powers conferred upon it by the Constitution, all other powers are reserved to the States or to the people. Among the enumerated powers granted is the power to lay and collect taxes and to use the revenues thus derived to pay the debts and provide for the common defense and general welfare of the United States. This power is one of the great powers of government, but from its very nature it is a power given in aid and support of other granted powers. It must always accompany some other power, for, if taken alone, it is a barren and meaningless thing.

Madison in the 41st paper of the Federalist described it as the "*sinew*" of other powers, and Hamilton called it, in the 31st paper, the "*essential engine*" by which the means of answering the national exigencies must be procured. It being thus, in consequence of its very nature, a power *providing the means by which other powers are to be exerted,* those other powers must of necessity determine the limits within which it must be exercised. The use of a *means* not directed to some *end* is not conceivable in government.

The appellant therefore asserts that, after revenues have been raised by the use of the taxing power, they can only be appropriated by Congress for a purpose within the limits of the powers granted to the Federal Government by the Constitution. The appropriation of money in and of itself is an idle ceremony which accomplishes no purpose and is not for a moment to be considered as within the power of any government, and particularly one of avowedly limited powers. The Constitution of the United States therefore must be examined to ascertain for what purposes these revenues may be appropriated, because, as has been seen, it is only in connection with the exertion of some power conferred upon the Federal Government that these revenues can ever be used at all.

The appellant therefore maintains that the term "general welfare" as employed in Clause I of Section 8, of Article III of the Constitution, was intended to describe those enumerated powers of the Constitution relating to the general welfare of the United States; that it was simply employed as a means of reference to those powers, and does not embrace anything beyond the powers so enumerated. Instead of undertaking in the clause under consideration to repeat or to refer specifically to each of the enumerated powers in aid of which the taxing power and the accompanying power of appropriation were to be exercised, the terms "common defense" and "general welfare" were selected as compendious expressions intended to embrace all of them.

It will be shown later that no words, restrictive or otherwise, would have been added to the clause granting

the power to lay and collect taxes, had it not been for the fact that certain members of the Convention, who were particularly interested in the debts which had been incurred by the Government under the Confederation, were insistent upon a specific provision being incorporated in the clause authorizing the payment of these debts. Having added the specific power *to pay the debts*, it became necessary, in order to avoid limiting the use of the revenues to that purpose alone, to add language which would permit their application to the other authorized purposes of the Government. Accordingly, the terms "common defense" and "general welfare" were used in order to embrace all of the other purposes provided for in the Constitution.* Had not the specific provision for the pay-

*The first Section of Article VI of the Constitution provides: "All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation." This clause was agreed to before any express qualification was placed upon the taxing power. But it was thought by Mr. Sherman that the clause for laying taxes and duties ought to have connected with it an express provision for the payment of the old debts; and he accordingly moved to add to that clause the words "for the payment of said debts, and for defraying the expenses that shall be incurred for the common defense and general welfare." This was regarded by the Convention as unnecessary, and was therefore not adopted. (Elliott, V., 476, 477.) On the 31st of August all matters not disposed of were referred to a new grand committee, who, on the 4th of September, introduced an amendment to the revenue clause which made it read: "The legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." This amendment was unanimously adopted, and when the Constitution was revised, at the close of the proceedings, the declaration which had been prefixed to the revenue clause making the debts and engagements of the Confederation obligatory upon the new Congress was placed by itself at the beginning of Article VI. (Elliott, V., 506, 507; Curtis' Const. Hist., Vol. II, 321, 322.)

Sherman, who was so solicious of securing the payment of the old debts of the Confederation, "was a member of the committee on the unfinished parts of the Constitution, and it is noticeable that favored ideas of the individual members were apt to be recommended by the committee. Gouverneur Morris was also a member, and as a representative of the moneyed interests, he naturally had been strongly in favor of a specific obligation to assume the old debts. These men probably had to do with the phrasing of the clause first referred to, and with its recommendation by the committee." Framing of the Constitution (Farrand), 177, 178.

ment of the debts been included, it is plain that the grant of the taxing power would of itself have carried the power to apply the moneys so raised to the effectuation of the other powers of the Government. *United States v. New Orleans*, 98 U. S. 381, 393, 394.

It should be perceived that the appellant's contention does not involve an attempt to put any limit upon the amount of revenue that the Congress may raise by an exertion of the *taxing power* under the Constitution. Whether there be any limit to its power in that respect is a totally different question from the one here presented. When Congress raises revenue through the method it has employed since the foundation of the Government, it is impossible, except in rare instances, to say whether the ultimate purposes and objects to which that revenue will be applied are such as are within or without Federal authority. It is only where an impost, excise or duty is laid upon a particular thing, and where the tax is manifestly levied to accomplish an object beyond the power of Congress that the question of constitutional authority *to impose* the tax can be raised.

It will appear later, from the examination of the authorities, that even this power to tax, in the first instance, has been held subject to definite limitations. But the case here does not, primarily at any rate, involve any such question. The question here concerns the power *to appropriate revenues* which it is assumed have been collected in conformity with the Constitution, to objects *which* are *beyond* any power vested in the Federal Government and incontrovertibly within the exclusive juris-

diction of the States. An appropriation is here made for a specified purpose. The Act assailed has authorized a definite appropriation and Congress has subsequently actually appropriated money for such purpose; and accordingly the question of its power to make this appropriation can be and is definitely raised by this proceeding.

This question has been the subject of discussion since the beginning of the operation of the Government under the Constitution. It has been considered by many of the leading statesmen of the country, whose views are preserved in many volumes of their published writings. The same question, or one closely analogous, has been twice raised in cases presented to this Court, but upon neither occasion was its decision necessary to the disposition of the case.

In *Field v. Clark*, 143 U. S. 649, 695, the power of Congress to provide for the payment of bounties upon sugar produced in the United States, and to appropriate money for their payment, was raised and argued, but the Court found the decision of the question unnecessary to the disposition of the case. In referring to this question of the power of Congress, the Court said:

> "The question of constitutional power thus raised depends principally, if not altogether, upon the scope and effect of that clause of the Constitution giving Congress power 'to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States,' Art. I, Sec. 8. *It would be difficult to suggest a question of larger importance or one the decision of which would be more far-reaching.* But the argument that the validity of the entire Act depends upon the validity of the bounty clause is so

obviously founded in error that we should not be justified in giving the question of constitutional power here raised that extended examination *which a question of such gravity would under some circumstances demand.* Even if the position of appellants with respect to the power of Congress to pay these bounties were sustained, it is clear that the parts of the Act in which they are interested, namely, those laying duties upon articles imported, would remain in force."

Again in *United States v. Realty Co.,* 163 U. S. 427, where the same question was presented, the Court likewise found it unnecessary to decide it. The Act of Congress there under consideration, the validity of which was sustained, provided for an indemnity to those who had expended money upon the faith of the Act of 1890 granting the bounty and which had been repealed. Even though the Act granting the bounty was invalid, Congress, of course, had the right to provide for payments to those who had suffered losses on account of having acted on the assumption that the Act of 1890 was a valid law. This right of Congress to make these payments is a necessary incident to the power to legislate. The power to pass acts of indemnity of this character must be inherent in any government having legislative power; such acts are as old as legislative bodies. (See concurring opinion of Mr. Chief Justice Chase, 4 Wall. 2, 136, 141.)

In *Miles Planting Company v. Carlisle,* 5 App. Cas. (D. C.) 138, the Court of Appeals of the District of Columbia held that the provision of the Tariff Act of 1890, granting bounties for the production of sugar in the United States, was unconstitutional and void. The

specific ground of this decision was that Congress had no power to impose taxes or appropriate money for anything other than a public purpose, and the giving of money to individuals on account of their engaging in a private enterprise was not a public purpose, and therefore unconstitutional. The same doctrine had been announced and applied in *Loan Association v. Topeka*, 20 Wall. 650; *Parkersburg v. Brown*, 106 U. S. 487, and *Cole v. LaGrange*, 131 U. S. 1. This principle, it is submitted, controls the decision of the case at bar. The granting of pure bounties (as distinguished from *drawbacks* on account of articles exported) has been defended upon the ground that the general welfare is promoted by the increased domestic production of articles necessary to the life and industry of the nation, and that the taxing power or the power of appropriating money may be used to encourage such a result, but the Court decided that neither of these powers could be used for such a purpose. The case in effect holds that there are definite limitations upon the power mentioned, and that neither can be used to promote the general welfare in any broad and unrestricted sense.

The So-Called "General Welfare" Clause Examined.

(*a*) Before reviewing the writings of public men upon this question, the clause of the Constitution of the United States itself should be examined. It is only in cases of doubt that resort should be had to any extrinsic source for the purpose of interpreting the Constitution. As Chief Justice Marshall declared, in an often quoted sentence in his opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 188:

> "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they said."

It is believed that it is practically demonstrable from a consideration of the language of the taxing clause that the words "general welfare" were intended only to refer to and include those objects contemplated by the other powers granted to the Federal Government by the Constitution.

In the first place, it is to be observed that the words "general welfare" in the very clause under consideration have imposed upon them a most significant qualification. They are found in the phrase, "to pay the debts and provide for the common defense and general welfare *of the United States.*" It is the general welfare *of the United States* which Congress is given the taxing power to provide for. What is *the United States* here referred to? Unquestionably it is the Union, the Government brought into existence by the Constitution. It is the general welfare *of the same Government or Union*—the same political entity—whose debts Congress is empowered to pay out of the revenues collected. These debts were the debts incurred or assumed by *that United States which was created by the provisions of the Constitution* and no other. The common defense for which provision was to be made was that common defense provided for *in the Constitution;* that is to say, the common defense which would result from the exercise of the power to raise and

support armies, to provide and maintain a navy, to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, to provide for organizing, arming and discipling the militia; the power to declare war, grant letters of marque and reprisal, etc. It was the exercise of these powers that constituted the common defense referred to in the provision under consideration. But if the debts mentioned in the clause are only those debts which are authorized to be paid *under the Constitution*, if the common defense embraces only those objects and purposes which are likewise specified in the Constitution, and those implied from such specification, why is not the meaning of the term "general welfare" also to be ascertained and explained by the other provisions of the Constitution?

Bearing in mind that the power to appropriate money cannot in its very nature be *an end of government in itself*, but a power which must accompany other powers which it is one of the means of effectuating, does it not become manifest that this power of appropriation *attaches to and is restrained by these powers* which the Government is authorized to exercise? Any objects which are outside of the purview of the Constitution, objects with respect to which the Government has no power or authority, are removed of necessity from the operation of the exercise of a power like the power of appropriating money, which in its very essence is simply a means of executing other powers within the competence of the Government to which it is delegated.

It is a general rule of interpretation that grants of power and limitations upon power granted, must be construed in the light of the nature of the Government to which the powers are delegated. For instance, in the second, third, fourth, fifth, sixth, seventh and eighth Articles of Amendment to the Constitution there is no reference whatever to the Government of the United States. The contention was made early in the history of the Government that the guarantees of personal liberty contained in these Articles were operative *alike upon the Federal and State governments.* But in the case of *Barron v. Baltimore,* 7 Pet. 247, Chief Justice Marshall said, with reference to this contention:

> "The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States *framed such a government for the United States* as they supposed best adapted to their situation and best calculated to promote their interests. *The powers they conferred on this government were to be exercised by itself;* and the limitations on power, if expressed in general terms, are naturally and we think necessarily applicable *to the government created by the instrument.* They are limitations of power *granted in the instrument itself;* not of distinct governments framed by different persons and for different purposes."

The amendments with which Chief Justice Marshall was dealing were general in their terms, and from their language were applicable to the powers of the State governments, as well as to the powers of the Federal

Government. But looking to the *nature of the instrument which they amended*, which was one containing delegations of power to the Government of the United States and not to the States, it was held that they must be limited in their application to the powers of the Government created by that instrument.* If this were true with regard to limitations, is it not more clearly the result in the case of a power like the power of appropriation, as it has been described above, particularly where the language granting it expressly provides, by the use of the words "*of the United States*," that it is attached to and is intended to accompany only those powers which the Constitution itself contains?

Furthermore, the clause "to pay the debts and provide for the common defense and general welfare of the United States" must contain every object and purpose to which Congress is authorized to appropriate money. There is no other clause in the Constitution specifying the objects or purposes for which appropriations may be made. The payment of debts and provision for the common defense would unquestionably not embrace all the purposes contemplated by the provisions of the Constitution, as, for instance, the establishment of postoffices

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*That the words general welfare *of the United States* were used in contradistinction to the general welfare of the several states is supported by the construction which has been given to the Fourteenth Amendment in a long line of cases.

"The language is, 'No state shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the word citizen of the state should be left out when it is so carefully used *and used in contradistinction to citizens of the United States*, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose." *Slaughter-House Cases*, 16 Wall. 36, 74. And see *Maxwell v. Dow*, 176 U. S. 581; *Twining v. New Jersey*, 211 U. S. 96.

and postroads, the regulation of commerce among the several States, etc., which, of course, do not relate to the common defense, and yet require the appropriation of money. Unless these and many other objects specified in the Constitution are embraced under the term "general welfare," no provision is made therein for appropriating money for them. It is apparent, therefore, if we assume, as we must, that, as the Constitution is in this clause specifying the objects to which money may be appropriated by Congress, this specification of objects was intended to be comprehensive and to include all the powers contained in the Constitution, and that a large number of these powers *must be embraced within the term "general welfare,"* else they are *not covered at all.*

But it is said that while it is true the terms "common defence" and "general welfare" were intended to refer to and embrace all of the enumerated powers, still this does not prove that these terms do not include purposes and objects beyond and in addition to those contemplated in those powers. Let this contention be examined for a moment.

It is obvious that, in so far as the enumerated powers are embraced within the term "general welfare," Congress has the power, in addition to appropriating money, to use all other means appropriate to the carrying out of these powers, and that the power of appropriating money is with respect to these enumerated powers coupled with the right to make the appropriation effective. Congress may in these cases not only appropriate money,

but may go further and see that the appropriation accomplishes the object for which it is made. But if the contention is sound that, with respect to any object not embraced within the enumerated powers, Congress may still exercise the naked power of appropriating money out of the Treasury for such object, it follows that, as to these additional objects, the power of Congress stands upon an entirely different footing and is reduced to the utterly barren act of giving away money, with no right to follow it and see that the objects for which it was appropriated are accomplished.

This method of reasoning therefore leads to the incongruous result that the expression "general welfare" embraces two entirely different classes of objects, one class being those contemplated by the enumerated powers as to which Congress has full and ample authority to exert *all* appropriate means of accomplishing, and the other class of objects with respect to which Congress possesses no power and is entirely impotent. This particular phase of the question will be reverted to later, when the scope and meaning of the power to appropriate money is examined.

But, it may be asked now, where does the efficient power to accomplish those objects appertaining to the general welfare not embraced within the enumerated powers, reside? Unquestionably, under the Tenth Amendment, it resides either in the several States or in the people. It does not reside in the Federal Government. With respect to the subject-matter of the particular Act whose constitutionality is here assailed, it must be

conceded, of course, that the power to deal with it is exclusively within the several States. It constitutes one of the most obvious and undoubted powers of the several States. The means by which that object shall be promoted are for the States to select and apply. It belongs, as Chief Justice Marshall said in *Gibbons v. Ogden*, 9 Wheat. 1, 203, to "that immense mass of legislation which embraces everything within the territory of the state not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, *health laws of every description*, as well as laws for regulating the internal commerce of a State * * *."

Those who assert the validity of the Sheppard-Towner Act are driven to admit that, outside of the naked power of appropriating money by Congress, the authority of the States to determine all measures which should be adopted to promote the objects of that Act is exclusive and complete. The power to *use any money* for that object, from whatever source derived, must of necessity therefore rest with the States. Is it conceivable that a power merely to appropriate money could have been intended to be granted to the Congress of the United States, when the power of applying it could not possibly be vested in it?

This examination shows that the contention of the Government in this case is self-destructive, for, if the power to appropriate money for purposes outside of the enumerated powers is limited, as it must be conceded by all that it is, to the appropriation of money *alone*, then it be-

comes impossible to say that any such appropriation is in fact for *any* purpose, because all governmental authority with respect to the expenditure of the appropriation is wholly within the State. Such an appropriation cannot be for any particular purpose. It becomes a bare, naked paying out of money for no purpose.

Under the Sheppard-Towner Act certain appropriations are made to the States. The scheme of the Act is that the States shall agree in advance with certain Federal agencies as to how the money shall be used, and if any State does not use such money as it has from time to time received for what, in the judgment of the Board of Maternity and Infant Hygiene, are proper purposes under the Act, then such State is not to receive any further money out of the appropriation. But obviously as to the amount such a State *has already received* prior to any adverse action by the Board, there is no pretense that the Government has any remedy, no matter how clear it may be, that the money has been applied to purposes not contemplated by the Act. This must be the case, because, if it is once admitted that Congress has the power *to follow money appropriated* from the Federal treasury for an object exclusively within the powers of the several States, in order to insure that the object of the appropriation is accomplished, then it is plain that the power of Congress is not limited to the power *of appropriating money* for such purposes, but it has a vastly greater power, which amounts to one of general legislation with respect to the object of the appropriation.

The power to use the money of the Government is an effective means of carrying out the objects for which the Government was instituted.* In normal times money is the great source of energy of the Government. With it, all its physical operations may be assured. It if had been the purpose of the framers of the Constitution to vest this basic power of appropriating money to any purpose outside of those enumerated in the Constitution, then we may be certain that the power would likewise have been delegated to see that the purpose for which the money was appropriated was carried out and accomplished. But it is clear that recognition of a power in Congress to use the money of the Government for any purpose appertaining to the general welfare, taken in its broad and popular meaning, would render futile all the pains of specifying the powers of the Federal Government in a written Constitution.

It is not therefore to be conceived that Congress has the power to follow the use of money appropriated to a State agency for State purposes through all its uses by those agencies and to supervise such uses without violating the whole theory and purpose of the Constitution. This being so, there can be no such thing as the appropriating of money by Congress for any objects of general welfare outside of those contemplated by the enumerated powers. Such a pretended appropriation is reduced by the necessities of the case to an appropriation for no purpose. It is a bare and naked appropriation to which no object or purpose can be assigned.

* "Even in levying local taxes in the territories where the power of Congress is plenary, the taxes must be for local purposes only." *Binns v. United States*, 194 U. S. 486.

The use of the money cannot be limited to a particular purpose, because it cannot be followed by any Federal agency to insure its application to that purpose, and therefore, in every real sense, the appropriation is nothing more than the mere act of paying out money from the Federal treasury.

When the States accept any appropriation from Congress, therefore, they take it, from every constitutional and legal viewpoint, merely as so many dollars, stripped of all conditions or qualifications. Whatever moral obligation there may be upon the States to apply it to the objects which Congress had in view when the appropriation was made, is entirely aside from the present discussion. *We are dealing with the question as to the existence or not of an asserted Federal power.* If a power is granted to the Federal Government by the Constitution, it must be a real and effective power and it cannot be a legitimate argument in favor of an asserted power to do a particular thing upon the part of the Federal Government to say that it may be accomplished if the States voluntarily, and through no constitutional obligation, do something that Congress may desire. The very statement of such a contention carries its own negation.

It has been shown in the early part of this discussion that the idea that there is any power of a general nature in the Constitution to legislate for the general welfare, independently of the enumerated powers, has entirely vanished from the domain of serious discussion. Such a contention never had any respectable sponsors. It was used simply as a makeweight in loose and irresponsible

political controversy. But it is submitted that even that contention was more logical than that which, while conceding that there is no power in Congress of legislating for the general welfare, regardless of the powers granted by the Constitution, yet maintains that there is a general power in that body of appropriating money for such purpose.

The former contention was answered by the simple statement that the recognition of any such power of general legislation would defeat the entire purpose of the specific enumerations of power in the Constitution. But that answer is equally applicable to the contention which seeks to establish the existence of an unrestricted power of appropriation for the general welfare. If valid in the one case, it must be in the other.

Those who contend that the clause of the Constitution under consideration authorizes the appropriation of money outside of the enumerated powers ignore entirely the language employed. They argue as if the word "appropriate" had been used instead of the word "provide." The taxes are to be levied "to pay the debts and *provide* for the common defense and general welfare." The word "provide" is unquestionably one of broader signification than the word "appropriate." It is apparent that the word "appropriate" has been selected by those who assert the broad power now being discussed for the very purpose of palliating the effect of the argument in its favor. The Constitution employs the word *provide*, because it was known that money was the usual and potent means *of providing for*

the accomplishment of those objects for which the Government was established under the Constitution. But if the attempt is made to extend the power to use the money of the Government to purposes beyond those for which it was instituted, then the word "provide" is a wholly inapt and inaccurate word. The use of the word "provide" carries the implication of a power to bring about and accomplish the thing to be provided for. It connotes fulfillment or achievement. When the efficient nature of *the right to use money for a particular purpose* is considered, when it is realized that it comprehends all those steps of which money is the inducement and the moving cause, then it is manifest that to provide for a given object by the use of money includes the right to control and supervise all of those things which attend its use for such purpose.

The argument, therefore, that Congress can transcend the limits of its granted powers and appropriate money for purposes beyond these powers, because it is not necessary in appropriating money for such purpose for Congress to exercise any power other than the bare power of appropriation, is answered by the very language of the Constitution. It can only be established by ignoring the crucial word of the grant. And thus it is seen that, if the term "general welfare" is not to be taken as a means of reference to the enumerted powers of the Constitution, and as being limited by them, then the language of the clause would carry a grant of power to do everything relating to the general welfare in its broad sense which could be accomplished by the use of money.

And as money can accomplish practically all the ends of government, a power would result of as vast an extent as that which has been shown to be universally denied.

If the construction for which the appellant here contends prevails, all the incongruities and inconsistencies which have been shown to inhere in the contention of the appellees in this case entirely disappear. Under it full effect is given to the word "provide" by limiting the power of provision *to those objects for which the Government was established by the Constitution.* All futile and aimless expenditure of money is removed from the contemplation of the Constitution; for when appropriated to accomplish the purposes enumerated therein, full and ample power is given to see that it is applied effectually to the purpose of the appropriation. The whole undertaking would then be within the power of Congress and subject to its complete authority. The discordant plan of having one government use its process of raising revenue in order to appropriate them for purposes exclusively within the jurisdiction of another government vanishes from our constitutional system. Under the contention of the appellant, the symmetry, order and harmony of that dual government contemplated by the Constitution are preserved. Under the contention of the appellees, they are destroyed.

The Relation of the General Welfare Clause to Other Provisions of the Constitution.

(*b*) If the clause in question is considered in the light of other provisions of the Constitution, the construction

here maintained is even more clearly demonstrated. The second of the enumerated powers in section 8 confers upon Congress the power "to borrow money on the credit of the United States." This power is without any expressed qualification, but would anybody contend that the Federal Government under this unqualified power would have the right to borrow money for use by the States in the administration of their purely local affairs? And so with other of the enumerated powers which are given in terms alike unqualified.

The power of eminent domain, which is closely related to the taxing power, affords another illustration of limitations imposed by the nature of the Government of the United States.* This power is not expressly conferred by the Constitution, but is one which must necessarily be implied in order that the Government may have the means of discharging its functions. It is also *expressly recognized* by that provision of the fifth article of amendment which forbids private property from being taken *for public use* without just compensation. This is *a limitation* upon a power the existence of which is presupposed. The limitation is upon the taking *for a "public use,"* a term of broader meaning than "general welfare." Does public use mean *any public* use, including both State and Federal uses? Obviously, the power to take private property by the Government of the United States is limited to the taking of it for purposes *within its delegated powers.* This is everywhere conceded.

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*"But so far as respects the *use*, the taking of private property by taxation *is subject to the same limitation* as the taking by the right of eminent domain." *Cole v. La Grange*, 113 U. S. 8.

"But if the right of eminent domain exists in the Federal Government, it is a right which may be exercised within the States, *so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.*" *Kohl et al. v. United States*, 91 U. S. 367, 372. And again in the same case it is said, "The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property *for its own public uses*, and not for those *of another*. Beyond that, there exists *no necessity;* which alone is the foundation of the right" (pp. 373, 374). See also *Shoemaker v. United States*, 147 U. S. 282, 298; *United States v. Gettysburg El. Ry.*, 160 U. S. 668, 679.

But, aside from these illustrations, the limitations upon the power of taxation conferred by the first clause of section 8, also compel the construction contended for.

The concluding part of the clause conferring the taxing power provides:

> "but all duties, imposts and excises shall be uniform throughout the United States."

The fourth clause of Section 9 of the same Article provides:

> "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."

Clause 6 of the same section provides that:

> "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State, be obliged to enter, clear or pay duties in another."

The purpose of these clauses was to insure the rule of uniformity as to duties, imposts and excises and the rule of apportionment with regard to capitation and other direct taxes.

The contention of the appellees in this case would provide the ready means of evading and defeating these rules of taxation so carefully guarded by these express provisions of the Constitution. If the appellees' contention is sound, the very taxes raised by the method of apportionment prescribed in the Constitution could immediately upon their collection be turned back to a favored few of the States, upon some pretext that thereby Congress was providing for the general welfare. It is true, of course, that even within the enumerated powers, Congress may expend Federal revenues so as to favor one State over another; it may so exercise its unquestioned power as to cause an excessive and partial expenditure of Federal moneys in particular States. But this possibility of abuse is one which is an unavoidable consequence of the vesting of authority in any government. But certainly it cannot be imagined that those who adopted the Constitution, although confronted with this necessary peril in the granting of limited powers, intended to take pains to invite such an abuse by conferring so vast and unrestricted a power as that now asserted.

If the contention of the appellees prevails, the Constitution, as adopted in 1789, conferred the right upon the Congress to collect unlimited taxes, and to appropriate them for undefined purposes to the various

States. It requires the ignoring of the enumerated powers in the application of the revenues so collected. The precedent of the present Act, if its constitutional validity is sustained, would justify the appropriation of money to the States for any object within their exclusive jurisdiction, for all the governmental powers of the States are exercised in a broad sense for the general welfare. Far from limiting the scope of the appropriating power, when the term general welfare is taken in the broad, unrestricted sense maintained by the appellees in this case, it has the result of extending that power over the whole field of government.

Once abandoning the principle that the funds in the Federal treasury are to be applied only in execution of the powers delegated under the Constitution, and admitting the power to use them for the so-called general welfare, all restraint in their application is removed. If the term "general welfare" in the Constitution is not defined and its signification ascertained by resort to the provisions of the Constitution itself, then who is to fix the definition? Would it be possible in any case to challenge the action of Congress in making appropriations of the public money?

The Act here in dispute has resulted, and doubtless it was contemplated that it would result, in some states not accepting the appropriations made under it. Whatever money is paid from the treasury under it will be paid for purposes which, under every conception of our dual form of government, are wholly State and local purposes. Even if every State in the Union accepted

the provisions of the Act, the purpose to which this money would be applied would be one solely within the province of each of the States as a separate member of the Union. But all have not accepted it, and some, it is believed, will never accept it. So that it can never become generally operative throughout the Union, even by the consent of the States themselves.

Is an appropriation of this kind one for the "general welfare," even in its loosest and widest sense? If it is, and if such an appropriation is authorized or sanctioned by the Constitution, then the door is open wide for the subjection of the States of the Union in the exercise of those powers which are incontestibly, exclusively theirs, to the will of the Congress of the United States.

Upon the adoption of the Constitution all taxes were thereafter to be raised either by the rule of uniformity or by the rule of apportionment. If there was this undefined and unlimited power of appropriation for the general welfare, even from the inception of the Government, the whole purpose of the rules of uniformity and apportionment was rendered ineffective and meaningless. We would have to contemplate the strange example of confused and jarring purpose on the part of the framers of the Constitution, in solemnly placing safeguards against the abuse of the taxing power in that instrument and at the same time providing a ready and effective means for the accomplishment of every evil which they were so solicitous of averting.

But if this were true at the time of the adoption of the Constitution, what shall be said of the situation

which now exists, when, under the Sixteenth Amendment, all the resources of the country resulting from the productive energy of the people can be readily gathered into the treasury of the Federal Government? If that Government is not subject to some limitation upon its power of appropriating money raised by taxation, then the life of every government of every State in the Union is at its mercy. If Congress at one time may take by means of taxation the money of the people of the several States in unlimited amounts, and later hand it back to the States according to rules of which it is the sole judge; if it may favor by money grants certain of the State governments selected with respect to one or many of their operations, upon the strength of its opinion that those operations are more conducive to the general welfare than those of other States, then there is in the Constitution the power to penalize and punish members of the Union on account of a difference of opinion between Congress and them as to the particular methods of government which should be pursued with respect to matters exclusively within their competence.

Federal taxation is even now laying its heavy hand upon the people of the country in every State. Some of the States are hard pressed to find the means for carrying on their necessary operations and any increase in Federal taxation only exaggerates this difficulty. The power now asserted by the Government would of necessity so increase the field for the application of Federal revenues, that it is readily conceivable that the States, or at least some of them, would be deprived of the means of discharging their legitimate and necessary

functions. The admission of a power such as that necessary to sustain the Act here challenged would reduce the States of this Union to the position of abject suppliants at the feet of Congress. There they must come to implore it to return the money which it has raised through its power of taxation for the purpose of appropriating to objects indisputably reserved to the States and never delegated to the Federal Government. This is where the appellees' contention leads. It is its inevitable and unavoidable consequence.

In the cases of *McCulloch v. Maryland*, 4 Wheat. 316, and *Collector v. Day*, 11 Wall. 113, the great principle was laid down that neither the Federal nor a State government has the power to tax the instrumentalities of the other employed in carrying out its governmental powers. These decisions are based upon the fundamental principle that the discharge of the powers delegated to the Federal Government, and of those reserved to the States, was necessary to the existence of the Union as contemplated by the Constitution; and that, as a consequence, each of these governments should be unfettered and unobstructed in the exercise of its powers by the use of the taxing power of the other.

The Court, in *Collector v. Day, supra*, said:

> "The general government and the States although both exist within the same territorial limits, are separate and distinct sovereignties acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independ-

ent of the general government as that government within its sphere is independent of the States'' (p. 124).

Again, the Court said:

> ''And if the means and instrumentalities employed by that Government [Federal] to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? *Their unimpaired existence in the one case is as essential as in the other.* It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, *can only exist at the mercy of that government.* Of what avail are these means if another power may tax them at discretion?'' (p. 127).

If the exemption from taxation of the means employed by a State government to carry out the powers reserved to it is based upon the law of self-preservation, does not the same principle put an end to the contention that the Federal Government has the right so to exert its power of appropriating money as to destroy the independent existence of the State so far as its undisputed reserved powers are concerned? Of what use would it be to exempt the mere machinery of a State government from taxation, if at the same time there is admit-

ted to exist in the Federal Government a power to deprive the State of the means of operating that machinery, and to send it begging at the doors of the Federal treasury for those means?

Not only does the contention of the appellees require the recognition of the existence of such a power, but, in order to sustain the Act now under discussion, it must justify the right of the Government in giving to the States the necessary funds to conduct their governments, to say at the time of distributing these funds what the machinery of those governments shall be and how their functions shall be discharged.

Surely it cannot in reason be said that those who framed the great Organic Act, under which there was to be created an indestructible Union of indestructible States, ever intended to place in that Act a grant of power so manifestly opposed to its whole purpose as that which is now claimed by the appellees in this case. The language of Mr. Justice Miller, speaking for this Court in the *Slaughter House Cases*, 16 Wall. 36, 78, may well be repeated here:

> "The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically

changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

The Views of the Leading American Statesmen and Jurists Upon the Question.

(c) The preceding discussion has been confined entirely to those considerations which spring naturally from the language of the Constitution. Everything which has been said it is now proposed to support by the writings of public men, the utterances of some of whom must be taken to express the contemporaneous opinion regarding the effect of the adoption of the clause of the Constitution now under consideration.

At the very time when the Constitution was the subject of debate in the conventions of the States, and when it was the object of certain of the champions of the new Constitution to have it adopted by these conventions, the Federalist was written and circulated among their members, in order to convince them of the necessity and wisdom of its adoption. The principal writers of these papers, as is well known, were Hamilton, Madison and Jay. Every contention which we have in the preceding part of this brief advanced is supported by the argument of Mr. Madison in the forty-first number of the Federalist, which undoubtedly had great weight in answering the objections which were at the time raised in opposition to the adoption of the Constitution. In a number of the preceding papers of the Federalist, writ-

ten by Mr. Hamilton, objections to the power of taxation, as it was proposed to be conferred by the Constitution, had been answered, but in the forty-first paper Mr. Madison returns to the subject for the purpose of disposing finally of certain of them. In the concluding part of the paper referred to he says:

> "Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of *the distress* under which these writers labor for objections, than in their *stooping* to such a *misconstruction.*
>
> "Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms 'to raise money for the general welfare.'
>
> "But what color can the objection have *when a specification of the objects alluded to by these general terms immediately follows,* and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded, as to give meaning to every part which will bear it, shall one part of the same sen-

tence be excluded altogether from a share in the meaning; and shall the more doubtful *and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatever? For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power?* Nothing is more natural nor common than first to use a general phrase, *and then to explain and qualify it by a recital of particulars.* But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity, which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing, had not its origin with the latter.

"The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the articles of Confederation. The objects of the Union among the States, as described in article third, are, 'their common defense, security of their liberties, and mutual and general welfare.' The terms of article eighth are still more identical: "All charges of war and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury,' etc. A similar language again occurs in article ninth. Construe either of these articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, *and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare?* I appeal to the objectors themselves, whether they would in that case have employed the same reason-

> ing in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation!"

This was the understanding of the clause of the Constitution under discussion when the question of the adoption of that instrument was pending before the conventions of the several States. Certainly this view *which was not at the time controverted or disputed* by any member of the Convention must be given conclusive weight when the question is now presented as to the meaning of that provision of the instrument.

It will be observed that Mr. Madison in the most emphatic way connects the expression "general welfare" *with the specific grants of power which immediately follow in the Constitution.* "For what purpose," he says, "could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural or common that first to use a *general phrase* and then to explain and qualify it by a *recital of particulars.*"

Many years later, in 1830, some controversy arose over the interpretation to be placed upon the so-called "general welfare" clause, and at that time Mr. Madison, who was then nearing the end of life, undertook, after a thorough review of the records of the Constitutional Convention made by his own hand, to give an accurate account of the steps which led up to the placing of the clause now in question in the Constitution. In a letter to Andrew Stevenson, written from Montpelier, and dated November 27, 1830, Mr. Madison said:

"The variations and vicissitudes in the modification of the clause in which the terms 'common defense and general welfare' appear are remarkable; and to be not otherwise explained than by differences of opinion, concerning the necessity or the form of a constitutional provision *for the debts of the Revolution;* some of the members apprehended improper claims for losses by depreciated bills of credit; others, an evasion of proper claims, if not positively brought within the authorized functions of the new government; and others again, considering the past debts of the United States, as sufficiently secured by the principle, that no change in the Government could change the obligations of the Nation. Besides the indications in the Journal, the history of the period sanctions this explanation."

Mr. Madison in this letter enters at great length into a review of the proceedings of the Convention for the purpose of showing that it could never have been its intention to confer any power *to legislate* for the general welfare or general interests of the United States, apart from the delegated powers. With that particular discussion we are not here concerned, because, as before stated, all the responsible public men of the country, all the commentators upon the Constitution, and this Court have foreclosed any contention that the Constitution contains any such general power.

No further reference to that question is necessary in this brief, but when writing the letter to Mr. Stevenson, in which the suggestion that the Constitution contained any such power was so completely demolished, Mr. Madison appended a note to it in which he was at pains to show that the modified argument that the same clause of the Constitution empowered the Congress to make

appropriations of money for purposes outside of the enumerated powers, was equally unsound and without support in any of the proceedings of the Convention. This note is found in Volume IX of The Writings of James Madison, edited by Gaillard Hunt. It so cogently answers all of the arguments which have been adduced in support of the indefinite power to *appropriate for the general welfare* that we have set it out at length as as an appendix to this brief. (See Appendix B.)

In this paper of Mr. Madison's, every aspect of the question is thoroughly considered and with a force of reasoning that must carry conviction. He shows that exactly the same consideration which requires the rejection of the contention that the taxing clause was meant to confer a general and unlimited power to legislate for the general welfare applies with like conclusiveness to the asserted power of the Congress to appropriate money for the general welfare, regardless of the powers enumerated in the Constitution. He demonstrates that the two contentions are in effect the same, because no such thing can be conceived, as the bare and naked power of appropriating money detached from some end contemplated by the Constitution.

It is pointed out that, if Congress has the power to appropriate money for purposes outside of the enumerated powers, then it must be concluded, by reason of the clause which gives Congress the power to pass all laws appropriate to the execution of the powers granted, that it would have full authority to make the purpose of the appropriation effective, and this is nothing more than

the general power of legislation which has been universally denied to have been delegated to the Congress. With great impressiveness he recalls that during the consideration of the Constitution by the States, while many objections were raised to the enumerated powers, it was never seriously suggested that the clause under consideration was subject to the interpretation which it is now sought to put upon it.

It has already been seen that in the forty-first paper of the Federalist, which was written at the very time the question of the adoption of the Constitution was pending in the State conventions, Mr. Madison, while dealing with this suggested construction of the Constitution, departed from the unimpassioned tone that pervaded all of his discussions of the Constitution and manifested a very decided contempt for the suggestion that he was combatting.

He says in the letter to Mr. Stevenson, and in the supplement thereto, that while a hundred and twenty-six amendments were suggested by the different State conventions and considered by the First Congress, not one contained any reference to the point now discussed. The conclusion, as he says, is irresistible that no one ever seriously thought that the clause was subject to any such broad construction. If such had been the case, with all the jealousy which then prevailed with reference to the powers of the Federal Government, there can be no doubt that it would have been a ground of opposition to the Constitution and amendments to negative any such construction would have been proposed and adopted.

Remembering the caution with which every power was scrutinized and the care always exercised to avoid implications from the language of the Constitution that would go beyond the objects and the purposes specified therein, it is inconceivable that it was ever intended to secrete in a hidden recess of that instrument a power which would nullify many of the express limitations upon the grants made, and to which objections of an infinitely more serious character could have been urged than any which were actually made and which were met by those amendments which were almost immediately adopted.

Mr. Madison, while President of the United States, upon the day preceding the expiration of his term of office, vetoed a bill, "For constructing roads and canals and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," and in his veto message denied the existence of the power in Congress of aiding internal improvements. After reviewing the several clauses of the Constitution under which this power was claimed to have been granted to the Federal Government, and having particularly denied that any such authority had been conferred by the so-called "general welfare" clause, he then discussed the modified claim as to the power of appropriating money for the general welfare, in almost the same language as that found in the supplement to his letter to Mr. Stevenson. He said:

> "A restriction of the power 'to provide for the common defense and general welfare' to cases which

are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution" (*Messages and Papers of the President,* Vol. I, p. 585).

The obvious meaning of this is that the asserted power of appropriating money, regardless of the enumerated powers of the Constitution, was equally as objectionable as the claim of a general legislative power, for the reason that the power to use money for undefined purposes would necessarily imply legislative power to carry the objects of the appropriation into effect, and would accordingly amount to the same thing as a general grant of legislative power.

This is referred to because there is a strange misunderstanding of this language, in the veto message of President Jackson disapproving the Maysville Road Bill, communicated to the House of Representatives on May 27, 1830 (*Messages and Papers of the Presidents,* Vol. II, p. 486).

In this message of President Jackson, he seems to take the view that Madison meant that, while the power of general legislation under the taxing clause could not be justified, nevertheless that clause did convey a general power of appropriation, independently of the objects enumerated in the Constitution. This is exactly contrary to what the language of President Madison itself and his entire public life show he did in fact mean.

Mr. Jefferson in his opinion upon the constitutionality of a National bank, referring to this clause of the Constitution, said:

"They (the Congress) are not to lay taxes *ad libitum for any purpose they please;* but only *to pay the debts or provide for the welfare of the Union.* In like manner, they are not *to do anything they please* to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.

"It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil; it would be also a power to do whatever evil they please.

"It is an established rule of construction where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which would render all the others useless. Certainly no such universal power was meant to be given them. *It was intended to lace them up straitly within the enumerated powers, and those without which, as means, these powers could not be carried into effect"* (*The Writing of Thomas Jefferson*, Library Edition, 1903, Vol. III, p. 148).

Mr. Jefferson here points out the controlling consideration of the entire matter. The power of appropriating money is essentially *only a means* for carrying out other powers, and is laced up straitly with them. It cannot be detached from and of necessity it is coterminous with such other powers.

There could not be a more conclusive statement of the contention of appellant than that of Chief Justice Marshall, in his opinion in the case of *Gibbons v. Ogden*, 9

Wheat. 1, 198, where he is examining the fundamental principles upon which the powers of Government were divided between the States and the National Government. He says:

> "The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. We are accustomed to see it placed, *for different purposes, in different hands.* Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary *for certain purposes,* is not, in its nature, incompatible with a power in another to take what is necessary *for other purposes.* Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare *of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other.*"

In a message of May 3, 1854, vetoing "An Act making a grant of public lands to the several States for the benefit of indigent insane persons," President Franklin Pierce said with reference to the clause here under consideration:

> "I take the received and just construction of that article, as if written to lay and collect taxes, duties, imposts, and excises *in order* to pay the debts and *in order* to provide for the common defense and general welfare. It is not a substantive general power to provide for the welfare of the United States, but is a limitation on the grant of power to raise money by taxes, duties, and imposts. If it were otherwise, all the rest of the Constitution, consisting of carefully enumerated and cautiously guarded grants of specific powers, would have been useless, if not delusive. It would be impossible in that view to escape from the conclusion that these were inserted only to mislead for the present, and, instead of enlightening and defining the pathway of the future, to involve its action in the mazes of doubtful construction. Such a conclusion the character of the men who framed that sacred instrument will never permit us to form. Indeed, to suppose it susceptible of any other construction would be to consign all the rights of the states and of the people of the states to the mere discretion of Congress, and thus to clothe the Federal Government with authority to control the sovereign states, by which they would have been dwarfed into provinces or departments and all sovereignty vested in an absolute consolidated central power, against which the spirit of liberty has so often and in so many countries struggled in vain. In my judgment you cannot by tributes to humanity make any adequate compensation for the wrong you would inflict by removing the sources of power and political action from those who are to be thereby affected. If the time shall ever arrive when, for an object appealing, however strongly, to our sympathies, the dignity of the states shall bow to the dictation of Congress by conform-

ing their legislation thereto, when the power and majesty and honor of those who created shall become subordinate to the thing of their creation, I but feebly utter my apprehensions when I express my firm conviction that we shall see 'the beginning of the end.' * * *

"The framers of the Constitution in refusing to confer on the Federal Government any jurisdiction over these purely local objects, in my judgment manifested a wise forecast and broad apprehension of the true interests of these objects themselves. It is clear that public charities within the states can be efficiently administered only by their authority. The bill before me concedes this, for it does not commit the funds it provides to the administration of any other authority.

"I cannot but repeat what I have before expressed, that if the several states, many of which have already laid the foundation of munificent establishments of local beneficence, and nearly all of which are proceeding to establish them, shall be led to suppose, as, should this bill become a law, they will be, that Congress is to make provision for such objects, the fountains of charity will be dried up at home, and the several states, instead of bestowing their own means on the social wants of their own people, may themselves, through the strong temptation which appeals to states as to individuals, become humble suppliants for the bounty of the Federal Government, reversing their true relations to this Union." (*Messages and Papers of the Presidents*, Vol. V, pp. 251, 252.)

This view was also maintained by President Buchanan in his message vetoing the Morrill School Bill. (*Messages and Papers of the Presidents*, Vol. V., pp. 557, 558.)

In his Lectures on the Constitution, Mr. Justice Samuel F. Miller says:

"The United States being a limited form of government, *one of the restrictions to which it is subject is in regard to its power to levy taxes.* The states may levy them for a great many purposes *for which Congress cannot*, because to the states belong all the powers not delegated to Congress. Hence, while the Constitution of the United States has nowhere been amended by any limitations of its taxing power, there has scarcely been a state constitutional convention in half a century that has not imposed some restrictions upon the power of the state to levy taxes" (p. 247).

Mr. George Ticknor Curtis, in an address before the Law School of Georgetown University in February, 1886, said:

"We hear much nowadays about the so-called 'general welfare clause' of the Constitution. The Constitution uses the words general welfare in just two places and no more. In the preamble the promotion of the general welfare is one of the objects enumerated along with five others, for which the people of the United States ordain and establish the Constitution. The wildest and most latitudinarian constructionist would hardly venture to tell an audience of intelligent law students that the preamble of the Constitution contains any grant of power. It simply asserts the grand objects which the people aimed to secure by the Constitution, but as to the means by which they do secure these desirable objects we must look into the body of the Constitution and among its enumerated powers.

"Looking into the body of the instrument we come upon the first clause of the eighth section of Article I of the Constitution, which contains the grant of the taxing power. Here the words general welfare are used again; and strange to say, there are persons who suppose that this clause contains a grant of authority to tax, in order to promote the personal welfare of every man, woman and child in the United States! I shall merely counsel you to analyze the

clause and see how strange this notion is. The clause grants to the Congress a power to tax the people for three special purposes: first, to pay the debts of the United States; second, to provide for the common defense of the United States; third, to provide for the general welfare of the United States.

"In every one of these special purposes for which the taxing power is to be exercised, 'the United States' means the political corporation known as the United States, and not the individual inhabitants of the country. The debts that are to be paid are the debts of the Government; the common defense that is to be provided for is the defense of the Government in all those matters it has duties of defense to discharge for the whole country; the general welfare that is to be provided for is the well-being of the Government in all those matters of which it has special cognizance and in respect to which its efficiency concerns the whole Union. In the very next clause which contains the grant of power to borrow money on the credit of the United States, the 'United States' is used in the same sense, meaning the Government known as the United States. It is on the credit of the Government, not on the credit of individuals or of States, that Congress is authorized to borrow money.

"Now look at the stupendous communism that is wrapped up in the taxing power, on the supposition that it includes a power to tax for the promotion of the welfare of individuals. There is no limit to the taxing power, excepting that duties, imposts and excises must be uniform throughout the United States. All the property in the country may be taxed without limit for the legitimate objects of taxation. If one of those legitimate objects is the welfare of individuals, or masses, or classes, or of the whole people, the two Houses of Congress and any President acting together can divide up all the property in the country upon the plea that a general division will promote the general welfare. By this process this Government could devour itself, and there would be nothing left for it to subsist

upon." (Quoted in speech of Senator John T. Morgan, Congressional Record, Vol. 17, pt. 2, page 1439.)

Turning now to the views of those who maintain that the power of appropriation extends beyond the objects enumerated in the Constitution, we have to examine particularly the opinions of three American public men.

In his celebrated Report on Manufactures, Alexander Hamilton, in speaking of the constitutional power of Congress to encourage industry by granting bounties upon certain productions, said:

"A question has been made concerning the constitutional rights of the Government of the United States to apply this species of encouragement, but there is certainly no good foundation for such a question. The National Legislature has express authority 'to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare' with no other qualifications than 'all duties, imposts, and excises shall be uniform throughout the United States; and that no capitation or other direct tax shall be laid, unless in proportion to numbers ascertained by the census or enumeration taken on the principles prescribed in the Constitution,' and 'no tax or duty shall be laid on articles exported from any State.'

"These three qualifications excepted, the power to raise money is plenary and indefinite, and the objects to which it may be appropriated are no less comprehensive than the payment of the general debts and the providing for the common defense and general welfare. The terms 'general welfare' were doubtless intended to signify more than was expressed or imparted in those which preceded; otherwise numerous exigencies incident to the affairs of a nation would have been left without a provision. The phrase is as comprehensive as any that could have been used, because it was not fit that the con-

stitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the 'general welfare' and because this necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition.

"It is therefore, of necessity, left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper. And there seems to be no room for a doubt that whatever concerns the general interests of learning, of agriculture, of manufactures, and of commerce are within the sphere of the national councils, as far as regards an application of money.

"The only qualification of the generality of the phrase in question which seems to be admissible is this: That the object to which an appropriation of money is to be made be general, and not local; its operation extending in fact or by possibility throughout the Union, and not being confined to a particular spot.

"No objection ought to arise to this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted, too, in express terms, would not carry a power to do any other thing not authorized in the Constitution, either expressly or by implication" (*Hamilton's Works* (Const. Ed.), Vol. IV, pp. 150-152).

It is to be observed that in the concluding paragraph Mr. Hamilton states that the asserted "power to appropriate money * * * would not carry a power to do any other thing *not authorized in the Constitution, either expressly or by implication.*" The limit of his contention therefore is that with respect to objects outside of

the enumerated powers, the clause under consideration only authorizes *the naked appropriation of money*. It is obvious that this concession was made because, if the power is claimed to extend beyond the mere appropriation of money, that is, if there is attached to such power any power to make the appropriation effective by legislation, then it cannot be a power of appropriation purely, but one as broad and general as an absolute delegation of all legislative power. It would embrace the power to do everything not expressly prohibited in the Constitution.

But, if there is no power beyond that of merely making the appropriation, then it is apparent that the act of appropriation is a vain and unreal thing. It cannot be an appropriation for the general welfare or for any purpose. When the money leaves the treasury it leaves without any legal qualification or condition. It is merely so many dollars passing from the Government into some other hands. Whatever the subsequent history of the money so appropriated may be depends upon the will of somebody other than the Congress of the United States. If given to a State (waiving for the moment the question as to whether in such a case it could in any conceivable meaning of the term be an appropriation for the *general* welfare) its use for a particular purpose, which may be desired by Congress, will depend upon the agreement with the State. But as there is no authority in the Constitution for such an agreement between the two governments, it would not only have no constitutional sanction, but would be clearly in violation of those provisions of the Constitution, which prescribe expressly how addi-

tional power or authority shall be conferred upon the Government of the United States.

Any agreement having therefore no legal or constitutional significance or sanction, the application of the money would rest entirely upon the free and voluntary action of the State after receiving it and this renders the supposed appropriation by Congress not one for the general welfare, even broadly conceived, but reduces the transaction to a naked passing of money from the treasury for no purpose whatsoever. If it be contended that the power *to agree with the States* as to the application of money appropriated from the Federal treasury is a power incident to the power to make appropriations for the general welfare, because an appropriate means of executing that power, then, of course, those who so contend must also maintain that Congress may select *any other appropriate means;* and this amounts to nothing more than a grant of general legislative power, as has already been shown.

Judge Story, in his Commentaries on the Constitution, beginning with Section 906 of Volume I, after first disposing of the suggestion that the clause under consideration was intended to confer substantive legislative power respecting the general welfare, independently of the enumerated powers of the Constitution, enters into a discussion in support of a power of appropriating money independently of the enumerated powers. All of his reasons defending the latter view, it is believed, have been answered in this brief by the examination which has been made of the provisions of the Constitution itself,

and by the views of those public men whose writings have been quoted.

No argument in favor of this indefinite power of appropriation, it is submitted, can ever avoid the manifest fallacy of giving a scope to a means of effectuating other powers which extends beyond the powers in aid of which it is conferred. Such an argument attempts to leave the means operative, while detached from every end, in connection with which it must be used. This inherent and unavoidable contradiction renders the contention logically indefensible.

After much argument by Judge Story directed to show that the words "provide for the common defence and general welfare of the United States" are used *as limitations on the taxing power,* which is exactly what the appellant here claims, he continues:

> "The truth is, as the historical review also proves, that after it had been decided that a positive power to pay the public debts should be inserted in the Constitution, and a desire had been evidenced to introduce some restriction upon the power to lay taxes, in order to allay jealousies and suppress alarms, it was (keeping both objects in view) deemed best to append the power to pay the public debts to the power to lay taxes; *and then to add other terms, broad enough to embrace all the other purposes contemplated by the Constitution.* Among these none were more appropriate than the words 'common defence and general welfare,' found in the Articles of Confederation, and subsequently with marked emphasis introduced into the preamble of the Constitution. To this course no opposition was made because it satisfied those who wished to provide positively for the public debts, and those who wished *to have the power of taxation co-extensive with all constitutional objects and powers.*"

So self-evident is the purpose of the terms "common defense and general welfare" to refer to merely those powers enumerated in the Constitution in which the common defense and general welfare were to be found, and nowhere else, that Judge Story's own statement of the steps which led up to the final adoption of the clause as it now stands in the Constitution, is a demonstration of that proposition. He seeks to destroy the force of it by adding the sentence, "In other words: it conformed to the spirit of that resolution of the convention, which authorized Congress 'to legislate in all cases for the general interests of the Union'." A thing which he has only a moment before shown to be impossible, because the proposition to confer power to legislate for the general interests *had been defeated,* and he has himself entered into ten pages of discussion to show that the clause in question was never intended to mean any such thing.

In Judge Story's discussion he refers to, and apparently adopts, the views of President Monroe, stated in a paper appended to his message of May 4, 1822, vetoing an Act for the preservation and repair of the Cumberland road. It is to this discussion of the interpretation of the taxing clause of the Constitution that all those who support the indefinite power of appropriation refer for its vindication. In this message President Monroe, like Judge Story, repudiates the idea that there is any power of legislation for the general welfare contained in the taxing clause, and he vetoed the bill then under consideration because he believed that, in addition to making an appropriation, it contained substantive legislation. A large part of his dissertation is devoted to

demonstrating that such an exercise of power under the supposed authority of the taxing clause is inconsistent with the theory and purpose of the Constitution. His basic argument is that such a construction would frustrate and render useless the provisions of the Constitution enumerating the powers which were to be conferred upon the National Government.

After this discussion he proceeds, however, to contend that the power of appropriating money is not necessarily limited by a *strict* construction of the enumerated powers. Several times he repeats the expressions *rigid construction* and *strict construction* of the Constitution, meaning, of course, that it was not necessary to vindicate each appropriation by showing that it was within a strict or rigid construction of a *single* grant of power as distinguished from all or some of them taken together. Driven, however, to find some limitation upon the asserted indefinite power of appropriation for the general welfare, and there being no limitation possible to be imposed, except by looking to the delegated powers of the National Government, he uses the following language, which itself conclusively answers and destroys the argument that the term "general welfare" is not to be limited, defined and restricted by reference to these enumerated powers:

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a *strict construction* of their powers, respectively, is there no limitation to it? Have Congress a right to raise and appropriate the money to any and to every purpose according to their will and pleasure? They certainly have not. The Government of the United States *is a limited Government,* instituted for great

National purposes, *and for those only.* Other interests are committed *to the States,* whose duty it is *to provide for them. Each* Government should look to the great and essential purposes *for which it was instituted,* and *confine* itself to those purposes. A State Government will rarely, if ever, apply money to National purposes without making it a charge to the Nation. The people of the State would not permit it. Nor will Congress be apt to apply money in aid of the State administrations for purposes strictly local in which the Nation at large has no interest, although the State should desire it. The people of the other States would condemn it. *They would declare that Congress had no right to tax them for such a purpose,* and dismiss at the next election such of their representatives as had voted for the measure, especially if it should be severely felt. I do not think that in offices of this kind there is much danger of the two Governments *mistaking their interests or their duties.* I rather expect that they would soon have a clear and distinct understanding of them and move on in great harmony." (*Messages and Papers of the Presidents,* Vol. 2, p. 167.)

It is thus seen that Mr. Monroe limits the power to appropriate public money to those objects for which the Government of the United States was instituted, as defined in the Constitution. This is precisely the contention made by Mr. Madison and Mr. Jefferson. The bill which President Monroe had under consideration was one appropriating money to be used in the erection of a great highway over several of the States of the Union. He vetoed it because he did not believe that Congress had the power itself to enter the boundaries of a State and carry on an undertaking of that sort. He could not find justification for it in the Constitution. He did, however, believe that Congress could appropriate money

for such a purpose, and this is what he said in that connection:

> "Good roads and canals will promote many very important National purposes. They will facilitate the operations of war, the movements of troops, the transportation of cannon, of provisions, and every warlike store, much to our advantage and to the disadvantage of the enemy in time of war. Good roads will facilitate the transportation of the mail, and thereby promote the purposes of commerce and political intelligence among the people. They will by being properly directed to these objects enhance the value of our vacant lands, a treasure of vast resources of the nation. To appropriation of public money to improvements having these objects in view and carried to a certain extent I do not see any well-founded constitutional objection." (*Messages and Papers of the Presidents,* Vol. II, p. 167.)

Having found, as President Monroe did, that the appropriation was for the purposes stated in his language just quoted, it is obvious that it was justified, not under any indefinite power of appropriating money, but under the enumerated powers of the Constitution. The truth is that President Monroe was struggling with a difficulty which has certainly long vanished from the domain of serious constitutional discussion. While believing that the construction of roads was a necessary and proper undertaking to be carried on for the benefit of the National Government, and in aid of its enumerated powers, yet not finding in the Constitution express authority to construct them, which under his principles of interpretation was necessary, he was compelled to deny the power to engage in such an undertaking. The limitations of his own views regarding our constitutional system, therefore, induced

him to find a means under the appropriating power of providing in some measure for instrumentalities that he believed necessary for the effective exercise of the powers granted to the Federal Govrnment.

His view, therefore, simply amounts to this: That while Congress did not have the power to use *any means* appropriate to carry out its granted powers, it did have the power to use those means expressly granted for this purpose. Under his view the power of appropriating money could be used in aid of those objects contemplated by the Constitution, because it was granted expressly in the Constitution, but other means not specified could not be employed. It will be seen that, consistently with his general theory of the nature of the Constitution, he expressly limits the use *of the power of appropriation to the accomplishment of those National purposes contemplated by the Constitution.* When his views are examined, therefore, it is seen that they do not conflict with the appellant's contention in this case, but in so far as they can stand at all in the light of the principles of constitutional law which are now generally accepted, they support that contention.

The Question Adjudicated.

(*d*) It is respectfully submitted that this question is conclusively determined by the recent decision in *Bailey v. Drexel Furniture Company,* 259 U. S. 20. This Court there declared invalid an Act of Congress imposing a tax of ten per cent. of the net income on a person employing child labor, without distinction between employers who employed a large or small num-

ber of children, and which exempted from the tax any employer who did not know a child so employed was under the prescribed age. Although in the form of a tax, it was manifest from the language of the Act imposing it that it was intended as a regulation of the employment of child labor.

The law was defended on the ground that it was a mere excise levied by the Congress under its broad power of taxation conferred by Section 8, Article I, of the Federal Constitution. It was asserted that the Court could not go behind the action of Congress imposing the tax, for the purpose of ascertaining what object it had in view in levying it. But finding that, under the guise of imposing an excise, Congress had attempted to regulate and control a matter exclusively within the reserved powers of the several States, the Act levying the tax was consequently declared invalid. The Court said:

> "It is the high duty and function of this Court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, *dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the states.* We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self government, on the one hand, and the national power on the other, our country has been able to endure and prosper for near a century and a half.

"Out of a proper respect for the acts of a coordinate branch of the government, this Court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject; but in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found in the very face of its provisions. *Grant the validity of this law and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are preserved to them by the Tenth Amendment, would be to enact a detail measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitations of the powers of Congress and completely wipe out the sovereignty of the States*" (pp. 37, 38).

It has been stated that this decision is conclusive of the present question because in principle it goes further than it is necessary to go in declaring invalid the Sheppard-Towner Act. It will be recalled that in the first child labor case (*Hammer v. Dagenhart*, 247 U. S. 251), the constitutional validity of an Act of Congress providing for the exclusion of articles produced by the use of child labor from interstate transportation was involved. The Act was defended upon the ground that, *having plenary power over interstate commerce, Congress could exclude* from such transportation any articles, which were, either in themselves or on account of their origin, inimical in its judgment to the general welfare of the United States.

In the argument of the Solicitor General in support of the Act (247 U. S. 254, 255), the effect upon the general welfare of the entire country, resulting from the permitted transportation of goods made by child labor, is elaborated, and the power of Congress to exercise its plenary power to regulate interstate commerce among the several states for the purpose of promoting this general welfare of the nation is asserted. But the Court, in declaring the Act unconstitutional, said:

> "*There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition.* Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at a economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.
>
> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, *and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.*
>
> "The grant of authority over a purely Federal matter was not intended *to destroy the local power always existent and carefully reserved to the States in the Tenth Amendment to the Constitution*" (pp. 273, 274).

Again, the Court said:

> "In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76. *The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the General Government. New York v. Miln*, 11 Pet. 102, 139; *Slaughter House Cases*, 16 Wall. 36, 63; *Kidd v. Pearson, supra.* To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction *an invasion by the federal power of the control of a matter purely local in character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States*" (pp. 275, 276).

Thus the attempt to exclude goods made by child labor from interstate transportation upon the ground that the commerce clause of the Constitution could be employed to promote the general welfare was repudiated by this Court. Then came the effort to accomplish the same object by the use of the taxing power. If Congress has any power *to appropriate* money for the purpose of the welfare of children within the several States, then it must be admitted that *in levying taxes* it may impose them for the same purpose; for clearly if it has the right to use the money for such purpose, when raised, it may, in levying the tax, do so with that end in view.*

* In *Loan Assn. v. Topeka*, 20 Wall. 655, where suit was brought to enjoin the enforcement of a contract to give public money to a private enterprise it was said by the Court, "the right *to contract* must be limited *by the right to tax*, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. * * * The validity of a contract which can only be fulfilled by a resort to taxation, *depends on the power to levy the tax* for that purpose."

Indeed, there is more justification for the power to levy a tax in such a way that its imposition will promote the public welfare than for the power to appropriate the money after it is raised for such a purpose. In one case there is of necessity a wide discretion vested in Congress in the selection of *the objects* upon which taxes shall be imposed, and an unconstitutional motive will not readily be attributed in their imposition; while, upon the other hand, in the appropriation of money, the specific purpose of the appropriation must be announced, and it must be for a purpose within the authority of Congress to make. When it has been adjudicated, therefore, that Congress cannot impose taxes for the purpose of "dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the States," *a fortiori* revenues in the treasury raised as a result of the exercise of the taxing power cannot be appropriated for such a purpose.*

"General Welfare" Meaningless Unless Defined by Reference to Enumerated Powers.

(*e*) Even if it be assumed that in appropriating money Congress is not limited to the objects contemplated by the enumerated grants of the Constitution, the question arises as to the character of the objects outside the enumerated powers for which such appropriations may be made. In other words, granting for the moment that there is a "general welfare" outside of the enumerated powers which may be provided for by the naked appropriation of money from the treasury, how is this "general welfare" to be ascertained and defined? Upon the

*It is to be noted that in none of the cases involving the validity of taxes levied by Congress has it ever been argued that they were justified upon any general power to provide for the general welfare irrespective of the enumerated powers. *Veazie Bank v. Fenno*, 8 Wall. 533; *McCray v. United States*, 195 U. S. 27; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *United States v. Doremus*, 248 U. S. 86.

one hand there are the enumerated powers of the Federal Government and upon the other powers reserved to the States or to the people. Certainly those objects which have throughout the history of the government been admitted to be within the exclusive legislative power of the States cannot be within the scope of the general welfare of the United States, no matter what latitude of definition is admitted with respect to that term. That the object contemplated by the Sheppard-Towner Act is exclusively within the power of the several States, there can be no question. That object is even more intimately and clearly a matter within local State control than the subject-matter of the child-labor laws, declared unconstitutional by the Supreme Court in the *Bailey and Dagenhart cases, supra.*

In *Barbier v. Connolly,* 113 U. S. 27, 31, speaking of the powers of the States, the Supreme Court said:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, *to prescribe regulations to promote the health,* peace, morals, education and good order of the people, and to legislate so as to increase the industries of the people, develop its resources, and add to its wealth and prosperity."

In *Houston v. Moore,* 5 Wheat. 1, 48, Mr. Justice Story says:

> "Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution."

In *Dartmouth College v. Woodward*, 4 Wheat. 518, 629, Chief Justice Marshall declared that:

> "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted *for internal government*, and that the instrument they have given us is not to be so construed may be admitted."

Mr. Justice Woodbury remarked in the *License Cases*, 5 How. at p. 628:

> "How can they (i. e., the States) be sovereign within their respective spheres, without power to regulate *all their internal commerce as well as police?*"

In *Lane County v. Oregon*, 7 Wall. 71, 76, Chief Justice Chase said:

> "Without the states in union there could be no such political body as the United States. * * * But in many articles of the Constitution the necessary existence of the States, and within their proper spheres the independent authority of the States, is distinctly recognized. To them nearly *the whole charge of interior regulation is committed or left.* To them and to the people all powers not expressly delegated to the national government are reserved."

In *United States v. Cruikshank*, 92 U. S. 542, 550, it was said by this Court, speaking of the Federal Government:

> "Within the scope of its powers, as enumerated and defined, it is supreme and above the States; but beyond it has no existence. * * * The powers that one possesses the other does not. * * * The Government of the United States is one of delegated powers alone. Its authority is *limited* and *defined* by the Constitution. All powers not granted to it by that instrument are reserved to the States or to the peo-

ple. No rights can be acquired under the Constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

Accordingly it may be taken as axiomatic that the purpose for which the appropriations are authorized in the Sheppard-Towner Act, and the appropriations made by Congress in pursuance thereof, is wholly and exclusively within the power of the several States and beyond the enumerated powers of the Federal Government. What laws shall be passed, or what measures taken, for such purpose the States are alone to decide. There is no vestige of authority in the Congress of the United States to interfere with the States in this regard. The subject-matter of the Act, therefore, being clearly without the domain of any authority of the Government of the United States, how can it be within the scope of the term "general welfare of the United States" found in the Constitution?

Article 4, Section 4, Clause 2, of the Constitution Giving Congress Power to Dispose of and Make All Needful Rules and Regulations Respecting the Territory and Other Property Belonging to the United States Does Not Confer Power to Appropriate Money from the Treasury for Objects Outside of the Delegated Powers.

(*f*) It will be observed from the discussion which has preceded, that those who have maintained that Congress may make appropriations for objects outside of the

enumerated powers have contended that such a power is found in the taxing clause. It was claimed that the term "general welfare" found in that clause was to be construed independently of, and was not to be limited by, the other provisions of the Constitution.

It is believed that no attempt has been made to justify the appropriation of money from the general funds in the Treasury for the so-called "general welfare," *i. e.*, for any purpose outside of enumerated powers, upon any other than the taxing clause of the Constitution. The clause giving authority *to dispose of* and make needful regulations respecting *the territory or other property* of the United States has never been relied upon as justifying *appropriations* from the general funds in the Treasury. The fact, therefore, that throughout the history of the Government no one has claimed that the power to dispose of property belonging to the United States, found in the clause just referred to, conferred any authority to dispose of funds in the Treasury, should in itself be a sufficient answer to any such contention. After money has gone into the Treasury of the United States, no matter from whence derived, whether from taxation or from sales of public lands or from any other source, it has been regarded as subject alone to the power of *appropriation* conferred by the Constitution, and not to the power of *disposition* mentioned in Clause 2, Section 3 of Article 4.

In *Van Brocklin v. Tennessee*, 117 U. S. 151, 158, 159, it was said:

> "*All the property and revenues* of the United States *must be held and applied as all taxes, duties,*

imposts, excises must be laid and collected, 'to pay the debts and provide for the common defence and general welfare of the United States.' *Constitution,* Art. 1, Sec. 8, Cl. 1; *Dobbins v. Erie County Commissioners,* 16 Pet. 435, 448. The principal reason assigned in *Buchanan v. Alexander,* 4 How. 20, for holding that money in the hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a State Court was, 'The funds of the Government *are specifically appropriated to certain national objects,* and if such appropriations *may be diverted and defeated* by State process or otherwise, the functions of the Government may be suspended.'" (Italics ours.)

And in *Dobbin v. Commissioners of Erie County,* 16 Pet. 435, 448, 449, it was declared:

> "The revenue of the United States is intended by the Constitution to pay the debts and provide for the common defence and general welfare of the United States; to be expended, in particulars in carrying into effect the laws made to execute all the express powers, and all other powers vested by the Constitution in the Government of the United States."

Under the Constitution funds in the Treasury can be disposed of only by *appropriation made by law.* Sec. 9 of Article 3 (Clause 7), provides:

> "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time."

This is the specific method prescribed for disposing of money in the Treasury and the distinction is thus emphasized between "money" in the Treasury subject to appropriation, and "the property," power *to dispose* of

which is conferred by Article 4, Section 3, Clause 2. Moreover, the clause last mentioned has always been taken as referring to the public domain belonging to the United States. The language of the section itself plainly shows that "the property" referred to was of the same nature as "the territory" belonging to the United States. The words are, "territory or other property belonging to the United States." Clearly under the rule of *ejusdem generis* the words "other property" must be confined to property of the same nature as territory.

If there were any doubt remaining that this clause of the Constitution was intended to refer to property of the Government such as lands, it would be set at rest by the concluding clause, "and nothing in this Constitution shall be so construed, as to prejudice any claims of the United States, or of any particular State." This shows beyond doubt that only that kind of "property" was contemplated about which there were disputes among the States, mainly lands.*

It is unnecessary to discuss the question as to whether power to acquire and govern the territories is found in the clause under consideration. While there are cases which suggest that such power is found in this clause (*United States v. Gratiot*, 14 Pet. 526, 537), the accepted view seems to be that this power is found in this clause

* There is nothing in the case of *United States v. Gratiot*, 14 Pet. 526, 537, 538, cited upon appellees' brief, in conflict with this statement. The question in that case was *whether a lead mine upon lands belonging to the United States* was property which the Government might dispose of under the clause now being considered. The Court, of course, held that it could. The quotation made from the opinion in appellees' brief (p. 21) should be read in connection with the main point raised in the case.

and the clause of the Constitution conferring the power to make treaties, taken together. *American Ins. Co. v. Canter,* 1 Pet. 511; *Downs v. Bidwell,* 182 U. S. 244, 250.

It is manifest that Congress is given exactly the same authority over the "other property" referred to in the clause as over the "territory," and if power is given in this clause to govern the territories and to make all needful rules and regulations respecting them, then the same general power would follow as to the "other property." Consequently, if the word "property" is held to embrace all the resources of the Government, Congress would have a power unlimited by the enumerated grants to dispose of all of them. But this argument proves too much. It has been seen that the unanimous opinion of all who have discussed this question has been that, so far at least as taxes are concerned, they may be applied to those purposes only which are specified in the taxing clause, namely, "to pay the debts and provide for the common defense and general welfare of the United States," and even the most latitudinarian constructionists have admitted that this *is a limitation* both upon the power to raise revenues and the power to appropriate them after they have found their way into the Treasury. Furthermore, it has been seen that had no purposes been specified in the taxing clause, it would never have been contended that the power to appropriate revenues raised by taxation extended to objects beyond the delegated powers. It has never been suggested, for example, that the power conferred to borrow money upon the credit of the United States gave any authority to borrow money for purposes outside of the enumerated powers.

The contention of appellees, therefore, that the word "property" employed in Article 4, Section 3, Clause 2, embraces every kind of property and confers upon Congress an unlimited and unrestricted power to appropriate all money in the Treasury of the United States would, if accepted, entirely frustrate these admitted limitations upon the appropriating power of the Government. All restrictions upon money borrowed and money raised by taxation, would vanish from the Constitution and Congress would be left with an unlimited power to raise money by taxation and by loans to any amount and thereafter to dispose of these funds for any purpose whatsoever. Surely a construction which is so in conflict with universally admitted limitations upon the power of appropriation cannot be entertained.

What has been said above does not challenge, for it is not necessary to do so in this case, the plenary power of Congress over the disposition of the public domain or over any property within the purview of Clause 2, Section 3 of Article 4 of the Constitution. The power of Congress to donate either the public lands or the proceeds thereof, even when kept distinct from other funds of the Government, for objects outside of the enumerated powers, has been denied by at least two of the Presidents of the United States who vetoed measures proposing such a disposition. But it may be conceded for the purposes of this argument, that Congress may make such disposition of the public lands or specifically of their proceeds as it may see fit. Its power in such a case, however, is plainly limited *to disposing* of such property, and every consideration which limits the

authority of Congress in making an appropriation to pass any legislation which would infringe upon the reserved powers of the States applies alike to its power to dispose of the public domain.

The contention of appellant simply stated is, that no power of the Federal Government can be stretched to the point where it destroys the *essential integrity* of the Union of States which it was the fundamental purpose of the Constitution to establish.

It is not contended by appellant that in disposing of this property Congress is limited to any particular method of disposition. It may sell, lease, donate or dispose of it in any other manner it may deem proper. It may also be conceded that it may dispose of it upon condition, so long as the condition is merely incidental *to the disposition of the property* and does not amount to an attempt to exercise governmental powers beyond those delegated to the Federal Government. *Tucker v. Ferguson*, 22 Wallace 572; *Ervien v. United States*, 251 U. S. 41.

Nor is it necessary for the appellant to challenge the power of Congress to dispose of the public lands either to educational institutions within the State or to the State for educational purposes. The power of Congress in this respect, having its origin in an express grant of power to dispose of the public domain, has no relevancy to the question involved in the present case. It was, of course, contemplated that the Government would not hold perpetually the lands acquired by it by cession from

the States, by purchase or those acquired by treaty, but that, in order to develop them, they should find their way into private ownership. Thus it was necessary that the power of disposition should be given to Congress, in order to enable the Government to divest itself of its *proprietary interest*, and in making this contemplated disposition it was obviously intended that Congress should have the same power as any other owner of property. But when the power of disposition has been exercised and the proceeds resulting therefrom go into the general funds of the Treasury, they necessarily become dedicated to the execution of those powers conferred upon the Federal Government and to these alone. It is not intended here to draw any sharp line between the time when the power of disposition has been fully exercised and the time when the proceeds of the sales become freed from the exercise of this power of disposition. As Congress could give away the lands, if it chose, it may, as a part of the act of disposition, give away the proceeds arising therefrom, until these proceeds become mingled with the general funds in the Treasury.

The practice under the statutes which donated the proceeds of sales of public lands to educational institutions within the States, was to dedicate specifically by statute these proceeds, so that through whatever department of the Government they went they might be earmarked and the fact of their dedication to the purposes specified by Congress placed beyond question. But, to repeat, whatever may be the authority of Congress to dispose of the public domain and to devote the proceeds from sales thereof to particular purposes, this question is not involved in the instant case.

The bill filed by the appellant alleges that the appropriations made under the so-called Sheppard-Towner Act are made from the general funds in the Treasury. Consequently there is no question here respecting any limitation upon the power of Congress either to donate the public lands themselves or the proceeds arising from the sale thereof.

Sheppard-Towner Act Not Justified by Legislative Construction of the Constitution.

(*g*) It is confidently believed that there is no legislative precedent for the Sheppard-Towner Act. It would, of course, prolong this discussion to impracticable length to review all of the legislative history of the country for the purpose of showing that there is no example of legislation of this sort. It is true that where a provision of the Constitution is of *doubtful* meaning, the Courts will give weight to legislative action, evidencing a particular construction of such provision where such legislative construction has been acquiesced in and acted upon for a sufficient length of time to indicate plainly that it has been generally accepted.

The discussion which has preceded clearly shows that there never has been any acceptance by Congress of the construction of the "general welfare" clause, for which appellees contend. That construction has been denied and contested since the foundation of the Government and upon several occasions it has been explicitly repudiated by Congress.

The appellees in their brief have cited a great many Acts of Congress which they say establish the asserted

construction of this clause of the Constitution, but there is no effort at all by appellees to show that the Acts of Congress which they cite do, in fact, support any such contention. They merely say that these Acts were passed under the supposed authority of the general welfare clause, but no history of the legislation is given nor are any of the statements of the sponsors of these measures quoted for the purpose of showing upon what provision of the Constitution their validity was rested. This is the burden which appellees must, in all justice, assume when they refer to Acts of Congress as being instances of the exercise of authority under a particular provision.

An examination of the precedents which form the main body of appellees' argument in defense of the Sheppard-Towner Act will disclose affirmatively that they were not, in fact, justified by those favoring their enactment under the general welfare clause. Of course, appellant does not mean that there may not have been individuals who contended that authority to enact a particular measure was conferred under that clause; but appellant maintains that the controlling view did not rest the validity of these measures upon it, but upon some other enumerated power found in the Constitution.

Appellees mainly rely upon the Acts of Congress relating to internal improvements, bounties, agriculture and education, and the legislative precedents under these four topics will be briefly examined.

Highways and Other Internal Improvements.

With respect to internal improvements, there can be no doubt about the fact that they are justified upon

several specific grants of power found in the Constitution.

Mr. Webster, who strongly favored internal improvements and who doubtless expressed the views of the advocates of such measures, maintained that the power to make appropriations for this purpose was found in the interstate commerce clause of the Constitution. In 1828 he said:

> "Congress has power to regulate commerce both internal and external; and whatever might have been thought to be the literal interpretation of these terms, we know the construction to have been from the very first assembling of Congress and by the very men who framed the Constitution, that the regulation of commerce comprehended such measures as were necessary for its support, its improvement, its advancement and justified the expenditure of money for such purposes as the construction of piers, beacons, and lighthouses, and the clearing of harbors. Instances of this sort in the application of the general revenues have been frequent, from the commencement of the government. As the same power, precisely, exists in relation to internal as to external trade, it was not easy to see why like expenditures might not be justified, when made on internal objects." *Works of Daniel Webster* (Natl. Ed.), Vol. II, 18.

The question of the source of the power to enact such measures has been adjudicated and, as is well known, this Court has found this power *in the enumerated grants* and not in the so-called general welfare clause. *California v. Central Pac. R. Co.,* 127 U. S. 1; *Cherokee Nation v. Southern Kansas Ry. Co.,* 135 U. S. 641; *Monongahela Nav. Co. v. United States,* 148 U. S. 312; *Luxton v. North River Bridge Co.,* 153 U. S. 525; *Wilson v. Shaw,* 204 U. S. 24.

The appellees quote a speech of Mr. Calhoun made in 1816 in which he says that the power to grant money for the construction of internal improvements was justifiable under the general welfare clause, but in that very speech Mr. Calhoun stated that the appropriation was also authorized by several of the enumerated powers. It has already been seen, from the discussion of the views of President Monroe, that those who opposed the power of the Government to construct highways, based their opposition upon the absence of any express power upon that subject. All of the arguments, therefore, in favor of the power to appropriate money for this purpose must be read in the light of the objections which it was the purpose of the arguments to answer. In view, therefore, of the fact that the now universally accepted source of power to construct highways and other internal improvements and to appropriate money therefor is found in several of the enumerated powers, as this Court has expressly held, no weight whatever can be given to the argument that the appropriations made by Congress for such purposes establish or tend to establish any practical construction of the general welfare clause.*

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* The report of the Committee of the House of Representatives to which the veto message of President Monroe was referred, quotd by appellees in their brief (p. 33), did not represent the view of the House of Representatives as is shown by Mr. Henry St. George Tucker in his brief filed as *amicus curiae* in the instant case. And it must be remembered that the Committee had under consideration the single question as to the power of Congress to appropriate money for internal improvements. The resolutions which were recommended by the Committee referred solely to the appropriation of money for that purpose, and, as Mr. Tucker points out, only one of them was adopted by the House. This was as follows: "Resolved, That Congress has power under the Constitution, to appropriate money for the construction of post roads, military and other roads and of canals, and for the improvement of water courses."

Bounties.

With respect to the Acts granting bounties upon articles exported, an inspection of them will show that they were based upon powers other than the general welfare clause.

The so-called bounties granted to the fisheries industry were not bounties at all in any real sense. Section 5 of the first so-called Bounty Act passed by Congress (Approved July 4, 1789; 1 Stat. 24), provided: "That there shall be allowed and paid on every barrel of pickled fish, of the fisheries in the United States, exported to any country without the limits thereof, *in lieu of a drawback of duties* imposed on the importation of salt employed and expenses therein, viz.," etc. (Italics ours.)

The subsequent Acts passed by Congress making specific payments to those engaged in the industry were expressly stated to be "as a commutation and equivalent" of this drawback. (Act February 16, 1792; 1 Stat. 229.) This is plainly the case under the Act of July 29, 1813, where it was provided by Section 3, that "no bounty, drawback or allowance shall be made" unless it shall be proved that the pickled fish "was wholly cured with foreign salt on which duty shall have been secured or paid."

Where bounties were granted upon articles exported, on account of the use therein of something imported upon which a duty had been paid and the bounty was simply the equivalent of such duty, it is manifest that Congress in such a case was merely providing a draw-

back or return of the duty paid and was exercising a power related to at least two of the enumerated powers, viz., the power to regulate foreign commerce and the power to impose duties upon imports. See *Miles Planting Co. v. Carlisle*, 5 App. Cas. (D. C.) 138.

Certainly, appellees cannot rely upon the bounties granted or attempted to be granted upon the production of sugar under the Tariff Act of October 1, 1890 (26 Stat. 527), as establishing a legislative construction of the Constitution. The validity of the part of the Act granting them was vigorously assailed at the time in Congress and was afterwards contested in the courts. As has been before stated, the Court of Appeals of the District of Columbia held these provisions of the Act to be unconstitutional, and by the Tariff Act of August 28, 1894 (28 Stat. 509), they were repealed.

Agriculture.

With respect to the Acts cited by appellees, establishing the Agricultural Department and making various appropriations for purposes relating to agriculture, it is to be noted that appellees do not attempt to show how any of the numerous Acts which they cite could by any possibility be justified under the general welfare clause. It is evident that, unless authority is found elsewhere in the Constitution, many of these Acts could not be justified, because they obviously go far beyond the exercise of the naked power of appropriation. It has been seen that all of the advocates of the unrestricted power of appropriation admit that where an appropriation is made for a purpose outside of the enumerated powers,

the action of Congress must be confined to making the appropriation.

The establishment of a great administrative department like the Department of Agriculture; the establishment of many bureaus in that department; the carrying on of all the activities of this department and these bureaus, which are mentioned by appellees in their brief, result not from the mere giving of money, but from the exercise of a substantive power of legislation, and, unless authority is found outside of the power to appropriate money to erect these agencies of the Government and to direct the manifold activities in which they are engaged, they would have no constitutional sanction.

It will be remembered that, although Hamilton includes agriculture within the objects comprehended by the term "general welfare" to which appropriations might be made, he states positively that as to those objects not contemplated by the enumerated powers, Congress must limit its exercise of power to making the appropriation. It is inconceivable that Hamilton would have contended that this power merely to appropriate money, authorized the erection of these vast agencies connected with the Department of Agriculture and the many activities in which they are engaged.

There are, of course, several of the enumerated powers upon which it may be argued that the legislation relating to the Agricultural Department is justified. In the first place, the United States is the owner of a vast public domain upon which agricultural pursuits are

carried on. Under the power to regulate commerce among the several States and with foreign nations, it has been contended by many of the leading statesmen of the country that Congress has authority to encourage production, in order to increase interstate and foreign commerce. Several of the more important activities in which the Department of Agriculture is engaged contemplate directly the protection of interstate and foreign commerce.

Education.

With respect to the Acts of Congress passed prior to 1900, relating to education, cited by appellees, the power to enact them was claimed to be found in that provision of Article IV which confers upon Congress power to dispose of and make all needful regulations respecting the territory and other property of the United States. It has been seen that both President Pierce and President Buchanan denied that any such power was conferred under this provision. Others, however, took a different view. At the time when the House of Representatives was considering the message of President Buchanan vetoing the Morill Bill, Mr. Morill, its sponsor, expressly declared that the power to enact it was found in Article IV of the Constitution, giving Congress the power to dispose of the public lands. (*Congressional Globe,* Thirty-fifth Congress, second session, 1858 and 1859, Part II, pages 1413 and 1414.) The bill failed of enactment and did not pass until 1862 (12 Stat. 503).

By Act of August 30, 1890 (26 Stat. 417), Congress made certain additional grants for the purposes of the

Morrill Act out of the *proceeds* of the sales of public lands. This was a specific donation of these proceeds. Not until the Act of May 17, 1900 (31 Stat. 179), did Congress make appropriations from the general funds in the Treasury for the purposes of the Morill Act. The fact that Congress for so many years, although from time to time urged to do so, refrained from making grants for educational purposes from the general funds in the Treasury, is conclusive evidence that it did not believe it had such a power. There were two appropriations from the general funds of small amounts to educational institutions, but these were of such an insignificant character that no one could possibly contend that they established a construction of a provision of the Constitution.

Since 1900 several appropriations of large amounts have been made for educational purposes from the general funds, but a practice only begun so recently can certainly afford no basis for an argument that a construction of the Constitution is thereby established, particularly when for over a hundred years a different practice prevailed.

It is important, in this connection, to refer to the protracted discussion in Congress relating to the Blair Common School Bill, which was introduced in 1883, and thereafter at every session of Congress down to 1890. It was proposed by this bill to provide for the distribution of $77,000,000 among the States in aid of common school education. The constitutional questions involved in the instant case were thoroughly and ably debated

and the judgment of Congress was several times expressed, by votes upon the measure, that no constitutional authority to enact it had been granted. A striking feature of this debate was that the vote in the Senate in its favor gradually decreased as the debate upon it progressed. A review of the debates upon the bill will show unmistakably that the constitutional objection was the controlling factor in its final defeat. There are several speeches of distinguished Senators wherein these objections are so thoroughly and ably discussed that they should be referred to here: Senator George Gray, Congressional Record, Vol. 19, Part I, 266; Senator George Vest, Ib. 300; Senator Richard Coke, Ib. 379; Senator John T. Morgan, Congressional Record, Vol. 17, Part II, page 1439; Senator Howell E. Jackson, Ib. 1471.

Miscellaneous Appropriations.

Appellees also cite many miscellaneous Acts containing appropriations for various purposes. They ask how appropriations of money to aid sufferers from calamities in foreign countries, as well as like sufferers in the United States, can be made, except under the general welfare clause.

It is hardly necessary to observe that these appropriations are usually prompted by the sympathy of the nation for the sufferers from these calamities and that constitutional scruples are suppressed under the influence of this natural sympathy. But it does not follow at all that these appropriations have been justified under the general welfare clause. In fact, it is apparent that

no such justification of them could be made. A gift of money to individuals in a foreign country certainly has no reference to the general welfare of the United States, and neither has the donation of money to aid sufferers in a particular locality of the United States. If there is constitutional warrant for these appropriations it must be found in other clauses of that instrument. As to the gifts to sufferers in foreign countries, doubtless authority is found in the power vested in the United States over international relations. The promoting of friendly relations with foreign countries is an object, of course, committed to the Federal Government and to it alone. The advantages in the way of trade and intercourse which flow from such good will and friendly relations are manifest. It was said by this Court in *Knox v. Lee*, 12 Wallace 457, 555:

> "The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments."

And again in *Chae Chan Ping v. United States*, 130 U. S. 581, 606, it was said:

> "For local interests the States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

See further: *Fong Yue Ting v. United States*, 149 U. S. 698.

As to the appropriations for sufferers in particular localities of the United States, it may be possible to contend that the Federal Government has a direct interest in restoring normal conditions within such locality, so that the operations of the Federal Government therein may be resumed. *In re Debs*, 158 U. S. 564.

Appellees give a number of other illustrations of appropriations, such as the fitting out of expeditions to explore the Polar Seas and to observe an eclipse of the sun. Clearly these matters have reference to commerce and navigation and the power of Congress to make appropriations for them is unquestioned.

Appropriations for expositions in cities in foreign countries and in this country are also referred to, but again it should be observed that it would not have been possible to justify these appropriations under the general welfare clause. If they can be justified, it must be under other clauses of the Constitution. The appropriations made for expositions in foreign countries it would doubtless be contended are warranted by the power of the National Government over the foreign relations of the country and over foreign commerce. As to expositions in this country, it might be claimed that they tend to promote interstate commerce, and further that, owing to the fact that they usually commemorate some great event in the history of the nation, Congress may encourage the patriotism of its people by aiding in the celebration of these great national events. *United States v. Gettysburg Electric Railway Co.*, 160 U. S. 668, 679.

It should be remembered that we are not discussing the constitutional validity of any of these legislative precedents which have been mentioned. That question cannot be involved in the instant case. The purpose of appellees in citing these precedents is to show that a practical construction of the Constitution in accordance with their contention has been established by the legislative branch of the Government. In order to deduce such a conclusion it must be shown that the appropriations referred to were justified by their advocates or by Congress under the general welfare clause. Unless appellees can show that, reference to these precedents is irrelevant. It is believed that rarely, if ever in the history of the Government, has there been any substantial body of opinion in Congress supporting the view that appropriations are authorized by the Constitution for purposes outside of the enumerated powers. In most all instances of appropriations for purposes of disputed constitutionality the power to make them has been rested upon some specific provision of the Constitution.

An interesting illustration of this is with respect to the Act of Congress establishing the Children's Bureau of the Department of Labor, the very agency charged with the administration of the Act here challenged. It was contended, when the bill proposing to establish this Bureau was before the Senate, that as Congress had no authority over the welfare of children it had no authority to gather information regarding them. The bill limited the duties of the Bureau to the gathering of information, and it was defended, not upon the general welfare clause of the Constitution, but expressly upon

several of the enumerated powers. During the debate Senator Elihu Root said:

> "Mr. President, we are vested by the Constitution with authority to legislate upon a vast range of subjects. We impose duties—customs and internal revenue duties. We have the power to impose direct taxes. We regulate commerce between the States and with foreign nations. We are vested with the power to propose amendments to the Constitution of the United States, if in our judgment the distribution of power between the States and the General Government ought to be changed. We have power to pass upon agreements between the States, in case the States choose to regulate among themselves their industrial competition; and for the purpose of performing duties which are imposed upon us in the exercise of our power in all this vast range of legislation, it is necessary that we shall be fully and broadly informed upon the social and industrial conditions of our country.
>
> "Now, sir, Congress must be its own judge as to the kind and scope of its information, and it must be its own judge of the agencies through which it will acquire that information. I have no question whatever of the power of Congress to provide for securing this information, and the reason we are now called upon to provide a new agency for acquiring information in this field is that the agents hitherto existing in this department, who have been engaged in doing this very work, have proved to be ineffective in the performance of the work, and we have accumulated a great mass of material of which no use is being made."

Later in the debate when Senator Root was asked by Senator Bailey to name one of several of the enumerated powers under which the proposed legislation could be justified, Senator Root said:

> "My answer is that there is not one power conferred upon Congress for the exercise of which a

> wise and prudent disposition of Congress will not provide for full and thorough information as to the conditions existing in the country for which we legislate. But the power of taxation, be it the power of regulating commerce, be it the power of establishing postoffices and post roads, be it the power of declaring war and making peace, whatever it be, it is out duty to know the conditions of the country regarding which we are legislating, and full and accurate knowledge regarding those conditions will make us better legislators and better able to perform our duty; and in order that we may be able to perform our duty upon instruction and knowledge rather than upon evolving ideas from our inner consciousness, I say that we have the implied power to collect that information and to put it in a form which it will be available for us and available for those who sent us here and who pass upon our acts." January 31, 1912, Cong. Rec., Vol. 48, Part II, pages 1567 and 1568.

This is cited for the purpose of showing that the advocates of measures making appropriations which have been opposed on constitutional grounds have sought to rest them upon some one of the enumerated powers and not upon the general welfare clause. It is believed that during the debate upon the bill to establish the Children's Bureau, only one Senator maintained that the authority to enact it was found in that clause.

Appellees in concluding their discussion of the legislative precedents say:

> "Can it be that the United States must abandon the Panama Canal, and the Philippines, that Florida must be returned to Spain, the Gadsden Purchase to Mexico, the Louisiana Purchase to France, Alaska to Russia and the Virgin Islands to Denmark?"

Appellant replies, "No." This reply, however, is given not for the reason that the general welfare clause

justified the construction of the Panama Canal or the purchase of foreign territory, but because these are authorized under the enumerated grants of power to the Government of the United States. It has been expressly so decided by this Court.

In *Shaw v. Wilson, supra,* where the question of the power of the United States to construct the Panama Canal was raised, this Court, in holding that such an undertaking was within the power of the Federal Government, found this authority in the power to govern the territory acquired by the United States and to regulate foreign interstate commerce and other enumerated powers of the Government.

Neither has the power to acquire territory from a foreign nation been drawn from the general welfare clause. It has been held expressly by this Court to have been conferred by the power to make treaties and the power to declare war. *American Insurance Company v. Canter,* 1 Peters 511.

But entirely apart from these considerations, it is respectfully submitted, that as the provision of the Constitution involved, is so clear and free from ambiguity when considered in the light of those controlling principles which govern the interpretation of that instrument, no practical construction, no matter how long continued, can defeat this clear meaning. The decisions of the Supreme Court establish the principle that practical construction can only be given weight *in cases of doubt;* it can have no weight where the language of the Constitution is clear.

In *United States v. Graham*, 110 U. S. 219, this Court said:

> "Such being the case, it matters not what the practice of the departments may have been or how long continued, *for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.* If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. *But with language clear and precise, and with its meaning evident,* there is no room for construction, and consequently no need of anything to give it aid.' "

And in the later case of *Fairbanks v. United States*, 181 U. S. 283, 311, 312, this Court said:

> "From this resume of our decisions it clearly appears that practical construction is relied upon *only in cases of doubt.* We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, *but where there was no doubt we have steadfastly declined to recognize any force in practical construction.* Thus before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."
>
> "We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases, as we have shown, often turns the scale; *but when the meaning and scope of a constitutional provision are clear, it cannot be overthrown by legislative action, although several times repeated and never before challenged.* It will be perceived that these stamp duties have been in force during only three periods: first, from 1797 to 1802; second, from 1862 to 1872; and third,

commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter that during the first periods exports were limited, and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. *Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.*"

Nothing that the Congress has ever done can be regarded as establishing a practical construction in favor of the contention of the Government in this case, but, even if this were not so, the meaning of the Constitution being free from doubt, no weight can be given to any action of that body or of any department of the Federal Government contrary to this obvious meaning of the Constitution itself.

Finally, although this reasoning seems to us to be conclusive, it is a sufficient answer to this argument of the appellees that the Constitution of the United States cannot be amended by breaking it.

II.

It has been seen that it is conceded by those who contend for the indefinite power of appropriation, that the action of Congress must be confined to making the appropriation and cannot be so exercised as to amount to substantive legislation. A simple inspection of the

Sheppard-Towner Act will show that there is no exercise of the power of appropriation in it; it does not purport to make an appropriation. It simply *authorizes an appropriation,* and this in fact was made *by an entirely distinct law.* The Act erects a Federal agency to carry out its provisions; elaborate administrative machinery is also provided. The scheme is that the Federal agency created shall agree with the officials of the several States upon plans to accomplish the purposes indicated therein. Not a dollar can be paid to any State unless the Board of Maternity and Infant Hygiene, which is a Federal agency, created by the Act, shall approve the plans of such State.

It is obvious from the provisions of the Act that its purpose is to coerce the States into the surrender of their undoubted power over the health and welfare of their women and children and over their officials who are charged with the administration of their health laws, to the control of a bureau and a board of the Federal Government. This the States are compelled to do or they cannot participate in the appropriation made by Congress. The money which is raised by taxation upon the people of the States is donated to some and withheld from others accordingly as they consent or do not consent to a surrender of their undisputed reserved powers.

The same reasons exactly which led this Court in *Bailey v. Drexel Furniture Company, supra,* to declare the tax there imposed invalid, compel a like decision with regard to the Sheppard-Towner Act. The Court in the *Bailey* case said:

"The case before us cannot be distinguished from that of *Hammer v. Dagenhart*, 247 U. S. 251. Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. * * *

"In the case at bar, Congress in the name of a tax, which on the face of the act is a penalty, seeks to do the same thing, and the effect must be equally futile.

"The analogy of the *Dagenhart case* is clear. The congressional power over interstate commerce is, within its proper scope, *just as complete and unlimited as the congressional power to tax*, and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress *threatened* to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and *to deny* the same to the people of a state *in order to coerce them into compliance with Congress' regulation of state concerns*, the Court said this was not in fact *regulation of interstate commerce*, but rather that *of state concerns, and was invalid*. So here the so-called tax *is a penalty to coerce people of a state to act as Congress wishes them to act* in respect of a matter *completely the business of the state government* under the Federal Constitution. This case requires as did the *Dagenhart case* the application of the principle announced by Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 423, in a much quoted passage:

" 'Should Congress in the execution of its powers adopt measures which are prohibited by the Constitution; or should Congress under *the pretext* of executing its powers pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a

case requiring such a decision come before it, to say that such an act was not the law of the land.' "

It may be asked where is there a vestige of authority in the Constitution authorizing the Congress to enter into any compact or agreement with a State regarding any matter pertaining to the internal police of the latter? Congress has here not only attempted to authorize an agreement between the Federal Government and the States, but a plan has been carefully devised whereby States *shall be compelled under severe penalties to enter into such an agreement.* The effect of the Act if carried out would be to transfer governmental power now wholly within the States to the Federal Government by means of an agreement between it and each of the States.

In Article V the method of amending the Constitution is expressly provided. No additional power can be conferred upon the Federal Government except by an amendment to the Constitution of the United States made in the manner prescribed. In only two instances is there any provision in the Constitution regarding the exercise of any authority by Congress with the consent of the States. In Section 8 of Article III (Clause 17), Congress is given exclusive jurisdiction "over all places purchased *by the consent of the legislatures of the States* in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and other needful buildings"; and in Section 3 of Article IV it is provided as a limitation upon the power of Congress to admit new States into the Union that no State shall be "formed by the junction of two or more States or parts of States *without the consent* of the States concerned as well as of

Congress." In all other cases, whatever authority is conferred by the Constitution upon Congress is plenary and may be exercised regardless of the consent of the States.

The Act now challenged, in addition to making an appropriation, has provided by an elaborate scheme of legislation for the administration of a fund to be disbursed for the purpose of carrying out an agreement which the Act purports to authorize between the several States and the Federal Government. This not only transcends the power of appropriation, no matter how elastic that power may be claimed to be, but it likewise violates the Constitution by attempting to augment the powers of Congress through the means of an agreement with the States for the surrender of powers unquestionably theirs, to the Federal Government.

It will be remembered that even Hamilton, while advancing his claim for the indefinite power of appropriation, admitted that it was subject to the qualification that the exercise of the power in so far as objects outside of the enumerated powers are concerned must be limited *to the grant of money solely.* He said:

> "No objection ought to arise to this construction from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power *to appropriate money* with this latitude which is granted, too, in express terms *would not carry a power to do any other thing not authorized in the Constitution either expressly or by implication.*"

And all those who agree with Hamilton regarding the scope of the power of appropriation concede a like

qualification. Can it be seriously contended that the Act under discussion does not transcend this admitted limitation?

It has been repeatedly decided by the Supreme Court of the United States that any agreement between the Federal Government and a State placing any limitation upon the full and complete exercise of the sovereign powers of the latter is unconstitutional and void. Even where such a limitation upon the State is placed in the Act admitting it into the Union it is invalid. Regarding this question, this Court, in *Pollard's Lessee v. Hagan et al.*, 3 How. 212, 223, said:

> "When Alabama was admitted into the Union on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of cession, except so far as the right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. *And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in cases in which it is expressly granted.*"

And numerous decisions declare the same principle: *Groves v. Slaughter*, 15 Pet. 449; *Permoli v. First Municipality*, 3 How. 589; *Scott v. Sandford*, 19 How.

393, 508, 509; *Withers v. Buckley*, 20 How. 84, 93; *Cardwell v. American River Bridge Co.*, 113 U. S. 205, 211.

It has been said that the Act does not provide for an agreement between the States, but only makes an appropriation upon a specified *condition*. This, however, the plain provisions of the Act itself show is not true. But what conceivable difference is there between an agreement with a State and an appropriation upon condition that a State shall surrender certain of its powers to the Federal Government to be exercised and controlled by an agency of that government? Putting the case from the standpoint of those who contend that the Act merely makes an appropriation upon condition, it comes to this, that Congress offers to give to the State a certain amount of money if the State will agree with a Federal board upon a plan which the State will follow in expending the money appropriated. If this does not contemplate an agreement then it contemplates nothing. The transparent purpose of the Act is to coerce the State by the threat of withholding money from it, if it does not administer certain of its internal affairs in a way approved by Federal authority. But even stated from the standpoint that the Act merely imposes a condition upon the payment of the money to the State, the situation is not at all changed because the imposition of a condition by legislation authorizing an appropriation contemplates *the acceptance of that condition*, and what is the acceptance of the condition by the State, but an agreement between the State and the Federal Government?

The prescribing of the condition by Congress presupposes a power *to exact* that condition and to enforce it if violated, and in order to justify any such right, authority over the *subject-matter contemplated by the condition* must be maintained. This reduces the whole argument to a claim of unlimited legislative power over the entire subject with respect to which the appropriation is made.

The truth is, of course, that if Congress has the power to impose a condition upon the grant of money it must have authority over the subject-matter with which the condition deals, and the imposing of the condition would then simply be *one means* of exercising authority over that subject-matter; but under plain principles of constitutional law Congress could select any other appropriate means for the exercise of such power. The result, therefore, would be that Congress could do *anything* appropriate to the accomplishment of any object to which it may make an appropriation *on condition.* This is nothing less than a claim of unlimited legislative power.

Certainly before the principle is adopted that Congress may make appropriations to the States upon conditions, the subject-matter of which has to do with the undisputed reserve powers of the States, the consequence of such a principle should be very deliberately considered. If that principle is established then there is no reserved power of a State which may not be controlled by Congress.

If the Sheppard-Towner Act is valid legislation, then Congress could have enacted an elaborate code regulat-

ing the same subject and have provided that the appropriation should be distributed among those States only which adopted it. There is no conceivable difference in principle between such legislation and the Sheppard-Towner Act. In the one case Congress would have adopted the plan itself while in the other a subordinate Federal agency is given authority to formulate it. Upon the same principle Congress could adopt what it deemed to be a model code regulating every subject within the reserved powers of the States and appropriate money to be distributed to those States which should adopt it. In this way the legislative, judicial and executive departments of the State governments could be entirely subordinated to the will of Congress.

It is no answer to say that in such a case it would remain with each of the States to decide whether they would accept the appropriation upon the condition named, for as before pointed out a State would be coerced into accepting, under the penalty of being deprived of equality of treatment as a member of the Union if it refused. Moreover, the spectacle would be presented of certain of the States in the Union surrendering their undisputed powers and others retaining them. What, in such a case, would become of that *equality* among the States which is the fundamental principle of the Union. Although the power to admit new States is without any express limitation, it has been decided a number of times by this Court that Congress cannot impose upon a State at the time of its admission *any condition* which destroys its equality with the other States of the Union. Any agreement between

Congress and a State which impairs any of the powers reserved to the States under the Tenth Amendment has been held to destroy this equality and, therefore, to be inoperative after such admission.

In *Coyle v. Oklahoma,* 221 U. S. 559, 580, after quoting the well-known passage from *Lane County v. Oregon, supra,* to the effect that without the States in Union there could be no such political body as the United States, the Court said: "To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic is organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." See also *Cincinnati v. Louis. and Nash. R. R. Co.,* 223 U. S. 390, 401, 402; *Escanaba Co. v. Chicago,* 107 U. S. 678, 688.

Has it not, therefore, been demonstrated that the Act in question does contain affirmative, substantive legislation over a matter entirely outside of any Federal authority and wholly within the power of the several States, and does not the reasoning which shows this also reinforce what has heretofore been said in support of the contention that the power of appropriating money granted to the Federal Government must of necessity be limited to those objects which are within the contemplation of the enumerated powers found in the Constitution?

III.

The Sheppard-Towner Act, it has been shown, does not itself mention any of the purposes to which the appropriation is to be devoted. It merely says that the money

authorized to be appropriated is for the purpose of co-operating with the States in promoting the welfare and hygiene of maternity and infancy as provided in the Act. The only provision of the Act outside of that directing the payment of expenses of administration, defining how the money shall be paid out and for what purposes, is Section 8, where it is provided that the States shall submit detailed plans to the Children's Bureau for carrying out the provisions of the Act within such State, which plans shall be subject to the approval of the Board of Maternity and Infant Hygiene.

The real purpose of the appropriation, therefore, is the carrying out of the plans so approved. Other than the general statement in the first section of the Act there is nothing to show *that Congress exercised any judgment or discretion regarding the purposes to which the money authorized to be appropriated should be applied.* Excepting that general statement, full and absolute authority over the entire subject is vested in the Children's Bureau and the Board of Maternity and Infant Hygiene.

It is respectfully submitted that no precedent can be found for any such legislation. It is a palpable delegation of substantive legislative power. Congress has never exercised that judgment in making this appropriation which the Constitution requires as a prerequisite to valid action on its part. It has attempted to substitute for itself another body, having no constitutional or legal responsibility, which is to determine the way in which this money shall be applied.

The Act is not distinguishable from one that, for example, should grant the sum of one hundred million

dollars to the Secretary of War for the general purpose of maintaining the defense of the Union, and giving him the authority to say what should be done with it. Certainly no one would contend that vesting such discretion in such an officer would be a valid exercise of legislative power. It is for Congress alone to say to what objects and purposes the money of the Government shall be applied, and any attempt to transfer or delegate the duty of selecting these objects to anyone else is a plain violation of one of the express provisions of the Constitution. It is provided in Section 9 of Article III (Clause 7):

> "No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

The requirement that appropriations can only be made by law, clearly contemplates that Congress, must, in all cases where money is granted, exercise its legislative judgment as to the propriety of the appropriation. In this case the purposes for which the money shall be expended were not selected by Congress, but are to be selected by a subordinate Federal agency. Congress did not know and could not possibly have known what plans the money appropriated was to be used to carry out. Furthermore, even if it be assumed, for the purpose of the argument, that Congress has the right to grant money for objects wholly within the power of the states upon some condition fixed by it, such a condition has never been imposed by Congress, but that body has delegated to the Children's Bureau and the

Board of Maternity and Infant Hygiene the authority to impose it. The money is payable upon the approval of certain plans by these agencies. If they are so approved by them then the money is paid; if not, it is withheld. *No rule or principle is announced in the Act to govern the discretion of the Bureau and Board in this matter.* They are absolutely uncontrolled so far as any legislative direction is concerned. Under all of the authorities everywhere, this, it is respectfully submitted, is an unconstitutional delegation of legislative power. *Field v. Clark,* 143 U. S. 649, 693; *Interstate Commerce Commission v. Illinois,* 215 U. S. 452; *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149, 164.

The Federal Government was called into being for the purpose of defending the States from foreign aggression and of regulating their intercourse *inter sese,* not to nourish either the people or the States. But for these needs, there would have been no Federal Government. Individualism and the right of individual self-government and development had been the inspiration of the struggles of our people from the days of Magna Charta. Seeking and following them, we peopled a continent and built up the greatest country on earth. These principles were believed to be embalmed in our Constitution as originally written and, out of abundance of caution, protected by the Tenth Amendment. And our Constitution can be amended only in the manner provided by it, not, as can the English, by legislative enactment.

CONCLUSION.

It is therefore respectfully submitted—

(1) That the Act is unconstitutional and void because the authority of Congress to appropriate money from the Federal Treasury is limited to making appropriations for objects contemplated by the enumerated powers of the Constitution.

(2) That the Act is unconstitutional and void because it is an attempt to exercise substantive legislative power by Congress over matters which are not within the delegated powers of the Federal Government, but exclusively within the powers of the States.

(3) That the Act is invalid because it amounts to a delegation of legislative power by Congress to a subordinate agency created by it.

We therefore submit that the decree of the lower Court dismissing the bill of complaint filed by the appellant should be reversed.

Respectfully submitted,

WILLIAM L. RAWLS,
GEORGE ARNOLD FRICK,
WILLIAM H. LAMAR,
Counsel for Appellant.

APPENDIX A.

AN ACT For the promotion of the welfare and hygiene of maternity and infancy, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, the sums specified in section 2 of this Act, to be paid to the several States for the purpose of co-operating with them in promoting the welfare and hygiene of maternity and infancy as hereinafter provided.

SEC. 2. For the purpose of carrying out the provisions of this Act, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the current fiscal year $480,000, to be equally apportioned among the several States, and for each subsequent year, for the period of five years, $240,000, to be equally apportioned among the several States in the manner hereinafter provided: *Provided,* That there is hereby authorized to be appropriated for the use of the States, subject to the provisions of this Act, for the fiscal year ending June 30, 1922, an additional sum of $1,000,000, and annually thereafter, for the period of five years, an additional sum not to exceed $1,000,000: *Provided further,* That the additional appropriations herein authorized shall be apportioned $5,000 to each State and the balance among the States in the proportion which their population bears to the total population of the States of the United States, according to the last preceding United States census: *And provided further,* That no payment out of the additional appropriation herein

authorized shall be made in any year to any State until an equal sum has been appropriated for that year by the legislature of such State for the maintenance of the services and facilities provided for in this Act.

So much of the amount apportioned to any State for any fiscal year as remains unpaid to such State at the close thereof shall be available for expenditures in that State until the close of the succeeding fiscal year.

SEC. 3. There is hereby created a Board of Maternity and Infant Hygiene, which shall consist of the Chief of the Children's Bureau, the Surgeon General of the United States Public Health Service, and the United States Commissioner of Education, and which is hereafter designated in this Act as the Board. The Board shall elect its own chairman and perform the duties provided for in this Act.

The Children's Bureau of the Department of Labor shall be charged with the administration of this Act, except as herein otherwise provided, and the Chief of the Children's Bureau shall be the executive officer. It shall be the duty of the Children's Bureau to make or cause to be made such studies, investigations, and reports as will promote the efficient administration of this Act.

SEC. 4. In order to secure the benefits of the appropriations authorized in section 2 of this Act, any State shall, through the legislative authority thereof, accept the provisions of this Act and designate or authorize the creation of a State agency with which the Children's Bureau shall have all necessary powers to co-operate as herein provided in the administration of the provisions of this Act: *Provided*, That in any State having a child-welfare or child-hygiene division in its State agency of health, the said State agency of health shall administer

the provisions of this Act through such divisions. If the legislature of any State has not made provision for accepting the provisions of this Act the governor of such State may in so far as he is authorized to do so by the laws of such State accept the provisions of this Act and designate or create a State agency to co-operate with the Children's Bureau until six months after the adjournment of the first regular session of the legislature in such State following the passage of this Act.

SEC. 5. So much, not to exceed 5 per centum, of the additional appropriations authorized for any fiscal year under section 2 of this Act, as the Children's Bureau may estimate to be necessary for administering the provisions of this Act, as herein provided, shall be deducted for that purpose, to be available until expended.

SEC. 6. Out of the amounts authorized under section 5 of this Act the Children's Bureau is authorized to employ such assistants, clerks, and other persons in the District of Columbia and elsewhere, to be taken from the eligible lists of the Civil Service Commission, and to purchase such supplies, material, equipment, office fixtures, and apparatus, and to incur such travel and other expense as it may deem necessary for carrying out the purposes of this Act.

SEC. 7. Within sixty days after any appropriation authorized by this Act has been made, the Children's Bureau shall make the apportionment herein provided for and shall certify to the Secretary of the Treasury the amount estimated by the bureau to be necessary for administering the provisions of this Act, and shall certify to the Secretary of the Treasury and to the treasurers of the various States the amount which has been apportioned to each State for the fiscal year for which such appropriation has been made.

SEC. 8. Any State desiring to receive the benefits of this Act shall, by its agency described in section 4, submit to the Children's Bureau detailed plans for carrying out the provisions of this Act within such State, which plans shall be subject to the approval of the board: *Provided*, That the plans of the States under this Act shall provide that no official, or agent, or representative in carrying out the provisions of this Act shall enter any home or take charge of any child over the objection of the parents, or either of them, or the person standing in loco parentis or having custody of such child. If these plans shall be in conformity with the provisions of this Act and reasonably appropriate and adequate to carry out its purposes they shall be approved by the board and due notice of such approval shall be sent to the State agency by the chief of the Children's Bureau.

SEC. 9. No official, agent, or representative of the Children's Bureau shall by virtue of this Act have any right to enter any home over the objection of the owner thereof, or to take charge of any child over the objection of the parents, or either of them, or of the person standing in loco parentis or having custody of such child. Nothing in this Act shall be construed as limiting the power of a parent or guardian or person standing in loco parentis to determine what treatment or correction shall be provided for a child or the agency or agencies to be employed for such purpose.

SEC. 10. Within sixty days after any appropriation authorized by this Act has been made, and as often thereafter while such appropriation remains unexpended as changed conditions may warrant, the Children's Bureau shall ascertain the amounts that have been appropriated by the legislatures of the several States accepting the provisions of this Act and shall certify to the Secretary of the Treasury the amount to which each State is en-

titled under the provisions of this Act. Such certificate shall state (1) that the State has, through its legislative authority, accepted the provisions of this Act and designated or authorized the creation of an agency to co-operate with the Children's Bureau, or that the State has otherwise accepted this Act, as provided in section 4 hereof; (2) the fact that the proper agency of the State has submitted to the Children's Bureau detailed plans for carrying out the provisions of this Act, and that such plans have been approved by the board; (3) the amount, if any, that has been appropriated by the legislature of the State for the maintenance of the services and facilities of this Act, as provided in section 2 hereof; and (4) the amount to which the State is entitled under the provisions of this Act. Such certificate, when in conformity with the provisions hereof, shall, until revoked as provided in section 12 hereof, be sufficient authority to the Secretary of the Treasury to make payment to the State in accordance therewith.

SEC. 11. Each State agency co-operating with the Children's Bureau under this Act shall make such reports concerning its operations and expenditures as shall be prescribed or requested by the bureau. The Children's Bureau may, with the approval of the board, and shall, upon request of a majority of the board, withhold any further certificate provided for in section 10 hereof whenever it shall be determined as to any State that the agency thereof has not properly expended the money paid to it or the moneys herein required to be appropriated by such State for the purposes and in accordance with the provisions of this Act. Such certificate may be withheld until such time or upon such conditions as the Children's Bureau, with the approval of the board, may determine; when so withheld the State agency may appeal to the President of the United States

who may either affirm or reverse the action of the Bureau with such directions as he shall consider proper: *Provided,* That before any such certificate shall be withheld from any State, the chairman of the board shall give notice in writing to the authority designated to represent the State, stating specifically wherein said State has failed to comply with the provisions of this Act.

SEC. 12. No portion of any moneys apportioned under this Act for the benefit of the States shall be applied, directly or indirectly, to the purchase, erection, preservation, or repair of any building or buildings or equipment, or for the purchase or rental of any buildings or lands, nor shall any such moneys or moneys required to be appropriated by any State for the purposes and in accordance with the provisions of this Act be used for the payment of any maternity or infancy pension, stipend, or gratuity.

SEC. 13. The Children's Bureau shall perform the duties assigned to it by this Act under the supervision of the Secretary of Labor, and he shall include in his annual report to Congress a full account of the administration of this Act and expenditures of the moneys herein authorized.

SEC. 14. This Act shall be construed as intending to secure to the various States control of the administration of this Act within their respective States, subject only to the provisions and purposes of this Act.

Approved, November 23, 1921.

APPENDIX B.

Mr. Madison's Supplement To His Letter To Mr. Andrew Stevenson.

(Italics author's; underscoring ours.)

"It is not to be forgotten, that a distinction has been introduced between a power merely to appropriate money to the common defense and general welfare, and a power to employ all the means of giving full effect to objects embraced by the terms.

"1. The first observation to be made is, that an *express* power to appropriate money authorized to be raised, to objects authorized to be provided for, could not, as seems to have been supposed, be at all necessary; and that the assertion of the power 'to pay the debts,' &c., is not to be referred to that cause. It has been seen, that the particular expression of the power originated in a cautious regard to the debts of the United States antecedent to the radical change in the Federal Government; and that, but for that consideration, no particular expression of an appropriating power would probably have been thought of. An express power to raise money, and an express power (for example) to raise an army, would surely imply a power to use the money for that purpose. And if a doubt could possibly arise as to the implication, it would be completely removed by the express power to pass all laws necessary and proper in such cases.

"2. But admitting the distinction as alleged, the appropriating power to *all* objects of 'common defense

and general welfare' is itself of sufficient magnitude to render the preceding views of the subject applicable to it. Is it credible that such a power would have been unnoticed and unopposed in the Federal Convention? in the State Conventions, which contended for, and proposed restrictive and explanatory amendments? and in the Congress of 1789, which recommended so many of these amendments? A power to impose *unlimited taxes* for *unlimited purposes* could never have escaped the sagacity and jealousy which were awakened to the many inferior and minute powers which were criticised and combated in those public bodies.

"3. A power to appropriate money, without a power to apply it in execution of the object of appropriation, could have no effect but to lock it up from public use altogether; and if the appropriating power carries with it the power of application and execution, the distinction vanishes. The power, therefore, means nothing, or what is worse than nothing, or it is the same thing with the sweeping power 'to provide for the common defense and general welfare.'

"4. To avoid this dilemma, the consent of the States is introduced as justifying the exercise of the power in the full extent within their respective limits. But it would be a new doctrine, that an extra-constitutional consent of the parties to a Constitution could amplify the jurisdiction of the constituted Government. And if this could not be done by the concurring consents of all the States, what is to be said of the doctrine that the consent of an individual State could authorize the application of money belonging to all the States to its individual purposes? Whatever be the presumption that the Government of the whole would not abuse such an authority by a partiality in expending the public treasure, it is not the less necessary to prove the exist-

ence of the power. The Constitution is a limited one possessing no power not actually given, and carrying on the face of it a distrust of power beyond the distrust indicated by the ordinary forms of free Government.

"The peculiar structure of the Government, which combines an equal representation of unequal numbers in one branch of the legislature, with an equal representation of equal numbers in the other, and the peculiarity which invests the Government with selected powers only, not entrusting it even with every power withdrawn from the local Governments, prove not only an apprehension of abuse from ambition or corruption in those administering the Government, but of oppression or injustice from the separate interests or views of the constituent bodies themselves, taking effect through the administration of the Government. These peculiarities were thought to be safeguards due to minorities having peculiar interests or institutions at stake, against majorities who might be tempted by interests or other motives to invade them; and all such minorities, however composed, act with consistency in opposing a latitude of construction, particularly that which has been applied to the terms 'common defense and general welfare,' which would impair the security intended for minor parties. Whether the distrustful precaution interwoven in the Constitution was or was not in every instance necessary; or how far, with certain modifications, any farther powers might be safely and usefully granted, are questions which were open for those who framed the great Federal Charter, and are still open to those who aim at improving it. But while it remains as it is, its true import ought to be faithfully observed; and those who have most to fear from constructive innovation ought to be most vigilant in making head against them.

"But it would seem that a resort to the consent of the State Legislatures, as a sanction to the appropriating power, is so far from being admissible in this case, that it is precluded by the fact that the Constitution has expressly provided for the cases where that consent was to sanction and extend the power of the national Legislature. How can it be imagined that the Constitution, when pointing out the cases where such an effect was to be produced, should have deemed it necessary to be positive and precise with respect to such minute spots as forts, &c., and have left the general effect ascribed to such consent of an argumentative, or, rather, to an arbitrary construction? And here again an appeal may be made to the incredibility that such a mode of enlarging the sphere of federal legislation should have been unnoticed in the ordeals through which the Constitution passed, by those who were alarmed at many of its powers bearing no comparison with that source of power in point of importance.

"5. Put the case that money is appropriated to a canal to be cut within a particular State; how and by whom, it may be asked, is the money to be applied to the work to be executed? By agents under the authority of the General Government? then the power is no longer a mere appropriating power. By agents under the authority of the States? then the State becomes either a branch or a functionary of the Executive authority of the United States; an incongruity that speaks for itself.

"6. The distinction between a pecuniary power only, and a plenary power 'to provide for the common defense and general welfare' is frustrated by another reply to which it is liable. For if the clause be not a mere introduction to the enumerated powers, and restricted to them, the power to provide for the common defense and

general welfare stands as a distinct substantive power, the first on the list of legislative powers, and not only involving all the powers incident to its execution, but coming within the purview of the clause concluding the list, which expressly declares that Congress may make all laws necessary and proper to carry into execution the *foregoing* powers vested in Congress.

"The result of this investigation is, that, the terms 'common defense and general welfare' owe their induction into the text of the Constitution to their connection in the 'Articles of Confederation,' from which they were copied, with the debts contracted by the old Congress, and to be provided for by the new Congress; and are used in the one instrument as in the other, as general terms, limited and explained by the particular clauses subjoined to the clause containing them; that in this light they were viewed throughout the recorded proceedings of the Convention which framed the Constitution; that the same was the light in which they were viewed by the State Conventions which ratified the Constitution, as is shown by the records of their proceedings; and that such was the case also in the First Congress under the Constitution, according to the evidence of their journals, when digesting the amendments afterward made to the Constitution. It equally appears that the alleged power to appropriate money to the 'common defense and general welfare' is either a dead letter, or swells into an unlimited power to provide for unlimited purposes, by all the means necessary and proper for those purposes. And it results finally, that if the Constitution does not give to Congress the unqualified power to provide for the common defense and general welfare, the defect cannot be supplied by the consent of the States, unless given in the form prescribed by the Constitution itself for its own amendment.

"As the people of the United States enjoy the great merit of having established a system of Government on the basis of human rights, and of giving to it a form without example, which, as they believe, unites the greatest national strength with the best security for public order and individual liberty, they owe to themselves, to their posterity, and to the world, a preservation of the system in its purity, its symmetry, and its authenticity. This can only be done by a steady attention and sacred regard to the chartered boundaries between the portion of power vested in the Government over the whole, and the portion undivested from the several Governments over the parts composing the whole; and by a like attention and regard to the boundaries between the several departments, Legislative, Executive, and Judicial ,into which the aggregate power is divided. Without a steady eye to the landmarks between these departments, the danger is always to be apprehended, either of mutual encroachments, and alternate ascendancies incompatible with the tranquil enjoyment of private rights, or of a concentration of all the departments of power into a single one, universally acknowledged to be fatal to public liberty.

"And without an equal watchfulness over the great landmarks between the general Government and the particular Governments the danger is certainly not less, of either a gradual relaxation of the band which holds the latter together, leading to an entire separation, or of a gradual assumption of their powers by the former, leading to a consolidation of all the Governments into a single one.

"The two vital characteristics of the political system of the United States are, first, that the Government holds its powers by a charter granted to it by the people; second, that the powers of Government are formed into

two grand divisions—one vested in a Government over the whole community, the other in a number of independent Governments over its component parts. Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments.

"Hitherto, again, all the powers of Government have been, in effect, consolidated into one Government, tending to faction and a foreign yoke among a people within narrow limits, and to arbitrary rule among a people spread over an extensive region. Here the established system aspires to such a division and organization of power as will provide at once for its harmonious exercise on the true principles of liberty over the parts and over the whole, notwithstanding the great extent of the whole; the system forming an innovation and an epoch in the science of Government no less honorable to the people to whom it owed its birth than auspicious to the political welfare of all others who may imitate or adopt it.

"As the most arduous and delicate task in this great work lay in the untried demarcation of the line which divides the general and the particular Governments by an enumeration and definition of the powers of the former, more especially the legislative powers; and as the success of this new scheme of polity essentially depends on the faithful observance of this partition of powers, the friends of the scheme, or rather the friends of liberty and of man, cannot be too often earnestly exhorted to be watchful in marking and controlling encroachments by either of the Governments on the domain of the other."

(Writings of James Madison, Vol. IX, pp. 424 to 431.)

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

HARRIET A. FROTHINGHAM, APPELLANT,
v.
ANDREW W. MELLON, SECRETARY OF THE TREASURY; GRACE ABBOTT, CHIEF OF THE CHILDREN'S BUREAU OF THE DEPARTMENT OF LABOR; HUGH S. CUMMING, SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE; JOHN J. TIGERT, COMMISSIONER OF EDUCATION, APPELLEES. } No. 962.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION BY THE APPELLEES TO ADVANCE.

Comes now the Solicitor General and moves the Court to advance the above-entitled cause to be heard at the same time that oral argument is had on the motion by the defendants in the case of *Massachusetts* v. *Mellon, Secretary of the Treasury, et al.*, No. 24 Original, to dismiss the bill of complaint filed therein by the State, which argument the Solicitor General, with the concurrence of the Attorney General of Massachusetts, will ask the Court to set for Monday, April 16th next.

41572—23

The appellees in this latter case are the defendants in the original action, and both suits involve a substantially similar challenge of the constitutionality of the Act of Congress "for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes," approved November 23, 1921 (42 Stat. 224), commonly known as the Sheppard-Towner Maternity Law.

The Act authorizes the annual appropriation for a period of five years to the States of specified sums upon their compliance with certain prescribed conditions, and the bills of complaint in both cases show that forty States have taken steps which manifest an intention to cooperate with the Federal Government in making effectual the beneficent purposes for which the statute was enacted. The Act concerns subject matters of such vital moment to the domestic life of the Nation that it hardly seems necessary to suggest the importance of the litigation and the desirability of an early decision therein.

Counsel for the appellant concur in this motion.

JAMES M. BECK,
Solicitor General.

APRIL, 1923.

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In The

Supreme Court of the United States

No. 962. October Term, 1922.

HARRIET A. FROTHINGHAM,

Plaintiff,

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY; GRACE ABBOTT, CHIEF OF THE CHILDREN'S BUREAU OF THE DEPARTMENT OF LABOR; HUGH S. CUMMING, SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE; JOHN J. TIGERT, COMMISSIONER OF EDUCATION.

BRIEF OF AMICUS CURIAE.

It is well at the outset to have clearly defined the object of this discussion. It is claimed by many that the words "the general welfare of the United States," as found in Article I, Section 8, Clause 1, of the Constitution, gives the power to Congress to appropriate money for any purpose which in the opinion of Congress pertains to the general welfare of the United States. The object of this paper is to contest that position and to show that such construction of that clause would be a

practical destruction of the Constitution and contrary to the object for which it was ordained. In Article I, Section 8, Clause 1, we find these words, as follows:

> "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and *general welfare of the United States;* but all duties, imposts, and excises shall be uniform throughout the United States."

Then follows the enumeration of sixteen additional specific grants of power which are followed by the coefficient clause in these words:

> "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

These words in Clause 1 of Article VIII, it is claimed, convey either a substantive grant of power to Congress to pass any law which effects the general welfare of the United States; or, at least the power in Congress to appropriate money for any purpose which may effect the "general welfare of the United States." It is proposed to examine this claim of power in all of its details and show that neither construction is justified by the words of the Constitution itself or by a historical examination of its making, or by the views of the commentators upon the Constitution from the beginning of the Government to this date, nor by the opinions of the judges, whose province it is to determine the functions and limitations of that great instrument. This examination will be made in detail.

I.

The meaning of the words "the general welfare" and their meaning as affected by their use where originally found.

The "welfare" of the people to be provided for by these words must be that which affects the whole people; not a part; not a class, but the public. It must be "general." A law, therefore, to help the people of a State, a class or community would not be general, but special welfare. The welfare contemplated must affect the whole, and not a part, of the people, for the words are broad and will embrace anything looking to the benefit, comfort or improvement of the people. So that a law looking to these ends passed by Congress, which is general in its application, and not special, in the opinion of the advocate of this interpretation is contemplated by the Constitution of the United States, because its aim and object is the welfare of the whole people. The words are of the broadest import. Could any be broader? What need, what want of the people of the United States, fails to be embraced in their boundless compass? Are not the blessings of liberty found therein? Is not freedom, civil and religious embraced in them? Are not the rights of property, domestic rights, and civil and religious rights, commercial and financial, and all other rights contained in them? Can the human mind conceive of anything affecting the well-being of the people which would not be embraced in these words? They are as broad as humanity itself and as boundless as the sea. And this amplitude of power is sought to be given to Congress by those who advance this construction.

In getting at the real meaning of a phrase, of course, the words themselves must first be considered, but if the

phrase has been used in other papers or documents, the construction and meaning which attached to it there would naturally attach to it in its new environment. And we inquire where the words "the general welfare" can be found elsewhere than in the Constitution of the United States. It is well known to all students of our constitutional history that these words were first found in the Articles of Confederation, in the III, the VIII and the IX Article. In Article III they appear as follows:

> "The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare."

Under this Article the Congress is given no power, and it is akin to a preamble declaring the fact that an alliance has been formed and setting forth the objects in view. How these are to be accomplished by Congress is set forth in the subsequent Articles VIII and IX.

In Article VIII they appear as follows:

> "All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury."

Did these words in the Articles of Confederation bear the broad interpretation which is sought to be given them now by those whose views we are combatting? If not, what was their meaning in these Articles? The Articles of Confederation were confessedly inadequate. The Constitution was framed to strengthen that weak instrument and to give to the United States a government that could function. Article II of the Articles of Confederation declares:

"Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation *expressly* delegated to the United States in Congress assembled."

It is claimed today that under these words in the present Constitution Congress has power to pass maternity bills and others of like character. These same words, "The General Welfare," we find used three times in the Articles of the Confederation. Will any man claim that under the Articles of Confederation, from which we derive this clause, a maternity bill would have been considered for a moment or recognized as a valid exercise of power under those Articles? Article II just quoted declares that unless *expressly* granted no such power existed in the Congress under the Articles of Confederation, and I think no one would be bold enough today to assert that under the Articles of Confederation such bills would have had a moment's consideration in the Congress of the Confederation. If that be true we find that the advocates of this new interpretation are seeking to give to these words transplanted from the Articles of Confederation to the Constitution of the United States a meaning which they never had in those Articles. Bound hand and foot by Article II, which denied to Congress any power except those *expressly* given, this phrase lay imbedded in three articles completely impotent as the source of any legislative power in the Articles of Confederation. If impotent, as a source of legislation where found originally, by what process of construction and by what species of ingenuity can their complete impotency—while resting in the Articles of Confederation—be transformed into a virile power which subordinates and annihilates all

other powers in the Constitution of the United States to which they were transferred.

Congress, under the Confederation, could lay no taxes nor raise money, but by loans and the emission of bills of credit, and by requisition on the States, and so on. Congress could not raise an army, for this was left to the States. Congress could not regulate commerce.

These objects and others confided to Congress in the Constitution of the United States all pertain to the general welfare of the United States. Congress could do none of these things because the Articles did not grant it the express power to do them. Can it be claimed then that the Congress of the Confederation, though denied these powers, could, under the "General Welfare" clause, have exercised such powers? Though denied the power to raise armies, or to lay taxes, yet these two powers are clearly embraced in the power to provide for "the common defense and general welfare," and if these latter words were endowed with the power sought to be given them now in the Constitution of the United States, how can the patriots of that day in the Confederation Congress be excused for failure to raise armies and lay taxes when American liberty was trembling in the balance; and, if powerless in the Articles of Confederation to do these things under the welfare clause, why should such power be assumed for these words when transferred to the Constitution of the United States, which abounds in specific grants to Congress, but which is limited by the Constitution of the United States as to all other grants by the Tenth Amendment? By what process of governmental construction could the architects of our present Constitution in the use of one of the stones of the defunct Confederation temple transfer this stone into our new Constitutional building, and give to it additional length and breadth and height unknown to it in its original

place? "Which of you, by taking thought, can add one cubit unto his stature"? And this is the more remarkable when it is remembered that when placed in our Constitutional building it was circumscribed by seventeen other stones chiseled with exactness in length and breadth to bear their proportionate share of the burden of the whole building.

As Mr. Madison said, Federalist No. 41:

> "But what would have been thought of that assembly (Congress of the Confederation), if, attaching themselves to those general expressions and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the Convention. How difficult it is for error to escape its own condemnation!"

These words are also found in the preamble to the Constitution of the United States, which is as follows:

> "We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

Of course, it will not be claimed that these words in the preamble constitute any grant of power any more than the expression to establish justice, or secure the blessings of liberty to ourselves, or any other provision in this preamble could be the source of power for action by Congress.

The meaning, if a question of doubt arises as to their proper construction, would be determined by the consideration of the whole instrument in which they are placed, and that construction arrived at which will give effect, if possible, to all parts of the instrument. Section 8 of Article I contains most of the specific powers granted to Congress, and this clause is included therein. These words are merely an expression of the general objects of the government, immediately followed by the specific enumeration of sixteen distinct powers, and then by the coefficient clause, which enlarges and expands those powers in the right of Congress to pass all necessary and proper laws for carrying them into effect. The advocates of this new construction must therefore explain why a power which embraces every need and every want of a people in every phase of human development in society, which needs no specifications to enlarge its power, why such a power should be lodged in an Article which follows with seventeen specific grants of power to Congress. These specific grants, under their claim, were useless, aimless, and of no effect, for they were all embraced in "the common defense and general welfare."

To sum up the argument, these words, "the general welfare," are found in the Articles of Confederation where Congress could exercise only powers *expressly* granted; these express grants of power embrace the right to declare war, make treaties, establish postoffices, etc.; but these words, "the general welfare," embrace also the power to lay and collect taxes, to regulate commerce, and so on, which are denied to the Congress of the Confederation, because not *expressly* granted. If this be true, why could not the Congress, if the words, "general welfare" meant then what is now claimed for them, have laid taxes, raised an army and regulated commerce, etc.? But this it never attempted to do; but did not the exigen-

cies of the times demand it? And yet these same words appear in the Constitution of the United States (Article I, Sec. 8), with the specific powers granted to Congress, and it is claimed that their impotence in the Articles of Confederation, by transfer, has been changed to an omnipotent power for legislation of every kind and description that the wisdom of Congress may suggest or the cupidity of the States demand.

Mr. Hamilton, in his report on manufactures in 1791, which is referred to in another part of this paper, in speaking of the power of Congress to appropriate money under "the general welfare," says:

> "The only qualification of the generality of the phrase in question which seems to be admissible is this: that the object to which an appropriation of money is to be made must be general and not local—its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot."

Now, observe his conclusion:

> "No objection ought to arise from this construction from a supposition that it would imply a power to do *whatever else* should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted in express terms, *would not carry a power to do any other thing not authorized in the Constitution*, either expressly or by fair implication."

Under this statement of Mr. Hamilton, Congress, under "the general welfare of the United States," may appropriate money *for any and for everything* that Congress may deem for the general welfare. These words, with no limitation, are boundless in their scope and embrace everything which Congress may deem for the good of the whole country. But, to soften opposition to such a sweeping power, he adds:

> "No objection ought to arise from this construction from a supposition that it would imply a power to do *whatever else* should appear to Congress conducive to the public welfare."

If the words "general welfare" embrace *all*, what else is left upon which legislation may be had? His limitation on this power is disclosed in these words:

> "A power to appropriate money with this latitude, which is granted in express terms, would not carry a power to do *any other thing* not authorized in the Constitution, either expressly or by fair implication";

that is, Congress, because granted, as he claims, in express terms, the power to appropriate money for the general welfare, to wit: to schools in the States, cannot do "any other thing," to wit: establish or create school systems in the States, because not authorized by the Constitution of the United States. This is a plain construction of his language. The result is that under this view Congress is prohibited from building a university or a school system in a State because the power has not been granted in the Constitution, but is allowed to support either with unlimited resources from the treasury of the United States when built or established by the State. Why should Congress be denied the power to create what it may maintain and support after creation? Or why should Congress have power to support by taxation an institution or a system of schools which it is denied the right to create? And how can such a position consist with the language of Judge Marshall in Gibbons vs. Ogden (9th Wheaton, 198-99):

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the States."

Congress need not, in levying a tax, set forth the purpose for which the tax is intended, but by reason of the

very nature of our government, such a tax, when levied by Congress, has excluded from its use and destination, as declared by Judge Marshall, "those purposes which are within the exclusive province of the States."

As against Mr. Hamilton's position, I invite careful consideration of the views of Mr. Madison (which are entitled to more force than those of any other man connected with the making of the Constitution) found in a letter to Mr. Stevenson of 27th of November, 1830:

> "If it be asked, why the terms 'common defense and general welfare,' if not meant to convey the comprehensive power, which, taken literally, they express, were not qualified and explained by some reference to the particular power subjoined, the answer is at hand, that, although it might easily have been done, and experience shows it might be well if it had been done, yet the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by identity with the harmless character attached to it in the instrument from which it was borrowed.
>
> "But may it not be asked with infinitely more propriety, and without the possibility of a satisfactory answer, why, if the terms were meant to embrace, not only all the powers particularly expressed, but the indefinite power, which has been claimed under them, the intention was not so declared; why, on that supposition, so much critical labor was employed in enumerating the particular powers, and in defining and limiting their extent?
>
> "The variations and vicissitudes in the modification of the clause, in which the terms 'common defense and general welfare' appear, are remarkable; and to be no otherwise explained, than by differences of opinion, concerning the necessity or the form of a constitutional provision for the debts of the revolution; some of the members, apprehending improper claims for losses by depreciated bills of credit; others, an evasion of proper claims, if not positively

brought within the authorized functions of the new government; and others again, considering the past debts of the United States, as sufficiently secured by the principle, that no change in the government could change the obligations of the nation. Besides the indications in the Journal, the history of the period sanctions this explanation.

"But, it is to be emphatically remarked, that in the multitude of motions, propositions, and amendments, there is not a single one having reference to the terms 'common defense and general welfare,' unless we were so to understand the proposition containing them, made on August 25th, which was disagreed to by all the States, except one.

"The obvious conclusion to which we are brought, is, that these terms, copied from the Articles of Confederation, were regarded in the new, as in the old instrument, merely as general terms, explained and limited by the subjoined specifications, and therefore requiring no critical attention or studied precaution."

* * * * * * * *

"That the terms in question were not suspected in the convention, which formed the Constitution, of any such meaning, as has been constructively applied to them, may be pronounced with entire confidence. *For it exceeds the possibility of belief, that the known advocates in the convention for a jealous grant, and cautious definition of Federal powers, should have silently permitted the introduction of words or phrases, in a sense rendering fruitless the restrictions and definitions elaborated by them.*

"Consider, for a moment, the immeasurable difference between the Constitution limited in its powers to the enumerated objects, and expanded, as it would be, by the import claimed for the phraseology in question. The difference is equivalent to two Constitutions, of characters essentially contrasted with each other; the one possessing powers confined to certain specific cases; the other extended to all

cases whatsoever. For what is the case, that would not be embraced by a general power to raise money; a power to provide for the general welfare; and a power to pass all laws necessary and proper to carry these powers into execution; all such provisions and laws superseding at the same time all local laws and Constitutions at variance with them? Can less be said, with the evidence before us, furnished by the Journal of the convention itself, than that it is impossible that such a Constitution as the latter would have been recommended to the States by all the members of that body, whose names were subscribed to the instrument?

"Passing from this view of the sense, in which the terms, 'common defense and general welfare,' were used by the framers of the Constitution, let us look for that, in which they must have been understood by the conventions, or rather by the people, who, through their conventions, accepted and ratified it. And here the evidence is, if possible, still more irresistible, that the terms could not have been regarded, as giving a scope to Federal legislation, infinitely more objectionable, than any of the specified powers, which produced such strenuous opposition, and calls for amendments, which might be safeguards against the dangers apprehended from them.

"Without recurring to the published debates of those conventions, which, as far as they can be relied on for accuracy, would, it is believed, not impair the evidence furnished by their recorded proceedings, it will suffice to consult the lists of amendments proposed by such of the conventions as considered the powers granted to the government too extensive, or not safely defined.

"Besides the restrictive and explanatory amendments to the text of the Constitution, it may be observed, that a long list was premised under the name, and in the nature of 'Declaration of Rights'; all of them indicating a jealousy of the Federal powers, and an anxiety to multiply securities against a constructive enlargement of them. But the appeal is

more particularly made to the number and nature of the amendments, proposed to be made specific and integral parts of the constitutional text.

"No less than seven States, it appears, concurred in adding to their ratifications a series of amendments, which they deemed requisite. Of these amendments, nine were proposed by the convention of Massachusetts; five by that of South Carolina; twelve by that of New Hampshire; twenty by that of Virginia; thirty-three by that of New York; twenty-six by that of North Carolina; and twenty-one by that of Rhode Island.

"Here are a majority of the States, proposing amendments, in one instance thirty-three by a single State; all of them intended to circumscribe the power granted to the general government, by explanations, restrictions, or prohibitions, without including a single proposition from a single State referring to the terms, 'common defense and general welfare'; which, if understood to convey the asserted power, could not have failed to be the power most strenuously aimed at, because evidently more alarming in its range, than all the powers objected to, put together. And that the terms should have passed altogether unnoticed by the many eyes, which saw danger in terms and phrases employed in some of the most minute and limited of the enumerated powers, must be regarded as a demonstration, that it was taken for granted that the terms were harmless, because explained and limited, as in the 'Articles of Confederation,' by the enumerated powers, which followed them.

"A like demonstration, that these terms were not understood in any sense, that could invest Congress with powers not otherwise bestowed by the constitutional charter, may be found in what passed in the first session of Congress, when the subject of amendments was taken up, with the conciliatory view of freeing the Constitution from objections, which had been made to the extent of its powers, or to the unguarded terms employed in describing them. Not

only were the terms, 'common defense and general welfare,' unnoticed in the long list of amendments brought forward in the outset; but the Journals of Congress show, *that in the progress of the discussions, not a single proposition was made in either branch of the Legislature, which referred to the phrase, as admitting a constructive enlargement of the granted powers, and requiring an amendment guarding against it.* Such a forebearance and silence on such an occasion, and among so many members, who belonged to a part of the nation, which called for explanatory and restrictive amendments, and who had been elected, as known advocates for them, cannot be accounted for, without supposing, that the terms, 'common defense and general welfare,' were not, at that time, deemed susceptible of any such construction, as has since been applied to them."

Surely nothing more need be added to this lucid and conclusive statement.

II.

We will now examine the section (Section 8, Article I, C. U. S.) giving the power to Congress "to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States," as shown by its development and final form of adoption in the Constitution itself, as the several plans of constitutions offered in the convention for adoption were considered, and especially the fate of provisions similar in meaning to these words, as construed by Judge Story, which were finally rejected.

Mr. Randolph's plan, in the from of resolutions, was brought forward. The resolution referring to the powers of Congress was as follows:

"That the National legislature ought to possess the legislative rights vested in Congress by the Confederation, and moreover *to legislate in all cases for the general interests of the Union,* and also in those

> to which the States are separately incompetent, but in which the harmony of the United States may be interrupted by the exercise of individual legislation." (Madison papers 120-21.)

When the committee to whom Mr. Randolph's plan was submitted reported, they brought in Mr. Pinckney's plan on the proposition of taxation, as follows:

> "The legislature of the United States shall have power to lay and collect taxes, duties, imposts, and excises." (Id. 1232.)

The feeling among members was very intense for maintaining the credit of the young Republic and seeing that provision was made for the payment of their debts; hence Mr. Livingston proposed the following:

> "The legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several States, during the late war for the common defense and general welfare." (Id. 1378.)

Subsequently, Mr. Morris proposed a substitute for Livingston's proposition, as follows:

> "The legislature shall discharge the debts and fulfill the engagements of the United States." (Id. 1402.)

Afterwards (Id. 1412) the several propositions took the following form:

> "The legislature shall fulfill the engagements and discharge the debts of the United States, and shall have power to lay and collect taxes, duties, imposts, and excises."

This was agreed to, but was afterwards reconsidered (Id. 1416). On reconsideration (Id. 1426), it took this form:

"All debts contracted and engagements entered into by or under authority of Congress shall be as valid against the United States in this Constitution as under the Confederation."

This was adopted. Mr. Sherman made a proposition (Id. 1426-27) on the taxing power, which was disagreed to, which is in substance the same as that reported by Mr. Brearly subsequently (Id. 1485-88), as follows:

"The legislature shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States."

This was adopted *nem con.*

Judge Story, after discussing the different stages of progress of this clause through the convention, very much as is done above, concludes with these words:

"In other words, it (this clause) conformed to the spirit of that resolution of the convention, which authorized Congress 'to legislate, in all cases, for the general interests of the union.'"

Very true, as the learned commentator says, that the "General Welfare" clause is in effect the same as the words

"to legislate, in all cases, for the general interests of the union."

The object of this paper is to demonstrate that fact, but Judge Story fails to note that the resolution containing these words which passed the convention was finally rejected when Mr. Pinckney's report was brought to the convention from the Committee on the 6th of August. Judge Story fails to realize that while the general welfare and the clause to which he refers are practically the same, the convention rejected the clause giving to Congress the power

> "to legislate, in all cases, for the general interests of the union."

If this clause meant what the words "the general welfare" mean, and this clause was rejected by the convention, how can we reach any other conclusion than that the meaning which Judge Story would now give to the words "the general welfare" was also rejected by the convention. The fact that such a resolution was proposed in the convention and rejected but adds strength to the view that the construction now sought to be given to the words "the general welfare" was deliberately considered by the convention and rejected. Could demonstration be stronger or clearer? Not only that, but did not the convention fail to adopt Mr. Randolph's resolution which was practically that proposed by Mr. Hamilton? (Madison Papers 1220-1221) (U. S. Constitutional Convention 1787 Journal, pages 131, 132 and 220) and did it not fail to adopt the provision suggested by Mr. Hamilton as set forth in Article I of his plan, as follows:

> "The supreme legislative power of the United States of America to be vested in two different bodies of men, the one to be called the Assembly, the other the Senate; who, together, shall form the legislature of the United States with power to *pass all laws whatsoever*, subject to the negative hereafter mentioned."

Here are two propositions, Randolph's and Hamilton's, both of which in their meaning and scope would have fully covered the construction now sought to be put upon the "General Welfare Clause." They were both represented by able and prominent men in the convention, each of whom came to the convention to press a certain form of Constitution, and each failed to get incorporated into the Constitution that clause which would have given Congress the power to legislate on all subjects; and having failed in getting the convention to adopt it, Judge

Story seeks to put a construction upon the words "general welfare" that would mean exactly what the rejected propositions meant. Can it be possible that so obvious a fact could have escaped the detection of the constitutional student of those days?

On the 17th of July the Convention had adopted, on motion of Mr. Bedford, a resolution giving power to Congress "to legislate, in all cases, for the general interests of the Union," etc., by a vote of 6 to 4. On the 6th of August Mr. Pinckney submitted his report omitting this provision, making the record clear that the Convention not only considered, but actually rejected the very principle now asserted in this law. (See U. S. Constitutional Convention, 1787, Journal, page 182 and page 291.)

When we look at the sketch of a Constitution that Mr. Hamilton proposed in the Convention, it is easy to understand why, when the Convention had rejected his plan for universal legislation by Congress on any subject, that his ingenious mind should have reached out to the "General Welfare" clause and sought to put life into its lifeless body.

On the 18th of June, after the Convention had been in session nearly a month, and Mr. Hamilton had participated but little, if any, in its debates, he offered a sketch for a Constitution, the cardinal features of which show his imperialistic convictions; the first clause of which is as follows:

> "I. The supreme legislative power of the United States of America to be vested in two different bodies of men; the one to be called the Assembly, the other the Senate; who, together, shall form the legislature of the United States, *with power to pass all laws whatsoever*, subject to the negative hereafter mentioned."

This clearly set forth the "General Welfare" clause.

Section III of his sketch provides:

"The Senate to consist of persons elected to serve *during good behavior.*"

Section IV provides:

"The supreme executive authority of the United States to be vested in a governor, to be elected to serve *during good behavior.* * * * The authorities and functions of the executive to be as follows: *To have a negative on all laws about to be passed,* and the execution of all laws passed."

Section VI provides:

"The Senate to have the sole power of declaring war."

Article X:

"All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and, the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the general government, and shall have a negative upon the laws about to be passed in the State of which he is the Governor or President."

Article XI:

"No State to have any forces, land or naval; and the militia of all the States to be under the sole and exclusive direction of the United States, all officers of which to be appointed and commissioned by them."

Had this proposition for a constitution been adopted, it would have compared favorably with that of any monarchical government in Europe. Mr. Hamilton was a wonderful man, a patriotic man, but his belief in republican principles was extremely attenuated. He believed in, and desired, a strong centralized government. Think

of the effect of the Senate being elected during good behavior! or the President during good behavior! Think of the power of the President against the wishes of the Congress to deny the passage of any and every law which he did not approve! This was not the veto power, but the power to say to Congress that as he did not approve, therefore a bill could not become law. Such a provision practically exists in the Constitution of Japan today, which states that the legislative power rests with the Emperor, with the approval of the Diet. Consider for a moment the power given to the Senate, whose members are to hold office during good behavior, to have the sole power of declaring war. Consider what "a wheel within a wheel" would have resulted had the Federal Government the power of appointing the Governor of each State, and that Governor had the power to negative any law passed by his State. Not only is power by these articles given the President practically to legislate for the United States, but to legislate for the States, because, under it, he would have the power of appointing the Governor of the State who would have the power to negative any law passed by the legislature of any such State; and then the capstone of the arch is seen in Article XI, where the militia of the States, which, under the present Constitution, is reserved to the States for their protection and defense, is put under the sole and exclusive direction of the United States in order to stifle any spark of resistence that this monarchical system might create in the minds of the people. And in his speech in the Convention presenting this scheme (Madison Papers, Vol. V., pp. 202-3), he said, "that the British Government was the best in the world; and that he doubted much whether anything short of it would do in America." And speaking further of the British Government, he said, "Their House of Lords is a most noble institution. Having nothing to hope for by a

change, and a sufficient interest, by means of their property, in being faithful to the national interest, they form a permanent barrier against every pernicious innovation, whether attempted on the part of the Crown or of the commons. No temporary Senate will have firmness enough to answer the purpose."

And discussing the conflict between the powers of the States and of the Congress as proposed in the Patterson plan, he said:

> "Giving powers to Congress must eventuate in a bad government, or in no government. The plan of New Jersey, therefore, will not do. What, then, is to be done? Here he was embarrassed. The extent of the country to be governed discouraged him. The expense of a general government was also formidable; unless there were such diminution of expense, on the side of the state governments, as the case would admit. *If they were extinguished*, he was persuaded that great economy might be obtained by substituting a general government. He did not mean, however, to shock the public opinion by proposing such a measure. On the other hand, he saw no *other* necessity for declining it. They are not necessary for any of the *great purposes of commerce, revenue or agriculture.* There must be district tribunals; corporations for local purposes. But *cui bono* the vast and expensive apparatus now appertaining to the States."

How different this view, which relegates the States to the scrap heap, and that would have merged the people into one body politic, from that of Judge Marshall, the great Chief Justice, when he used those wonderful words:

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass." (McCullouch vs. Maryland, 4 Wheat. 403.)

How different from the judgments of Marshall, and Taney, Chase, and Waite, Fuller and White, and Taft, who have often proclaimed the doctrine that to pull down the States would be to destroy the superstructure of the Federal Government.

On the next day (Id. 212), Mr. Hamilton said he "had not been understood yesterday. By an abolition of the States, he meant that no boundary could be drawn between the National and States Legislatures; *that the former, therefore, must have indefinite authority.* If it were limited at all, the rivalship of the States would gradually subvert it. Even as corporations, the extent of some of them, as Virginia and Massachusetts, would be formidable. As States, he thought they ought to be abolished." The explanation only emphasizes his former position.

Mr. Hamilton went to the Convention with these monarchical ideas, which, if they had been adopted, would have built up upon this Continent a monarchy more tyrannical than that of Imperial Rome. In this attempt he failed, and having failed, he and his followers seek by their interpretation of these words, "General Welfare," to put into the Constitution that which the Convention was asked to adopt, which was considered by it and rejected, for there was his proposition laid down in Article I, to give Congress power to pass all laws whatsoever, and which was substantially proposed in the Randolph plan (Id., page 127), and which was temporarily adopted by the Convention and afterwards reconsidered and rejected.

III.

Now consider these words in their structural relationship to the clause wherein they are found, Article I,

Section 8. Article I, Section 8, contains most of the enumerated powers granted by the Constitution to Congress.

(1) "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

(2) "To borrow money," and so on;

(3) "To regulate commerce," and so on,

enumerating eighteen (18) specific grants of power to Congress. The question arises, do these words,

> "To pay the debts and provide for the common defense and general welfare of the United States,"

grant a substantive power, "or do they declare only the object of the tax power preceding."

> "To the first branch of the question we give a negative answer; to the second an affirmative answer, for the following reasons:
>
> "1st. The structure of the sentence requires this interpretation. To 'pay the debts, and provide for the common defense and welfare of the United States,' if a distinct power from the power to 'lay and collect taxes,' etc., should not have intervened between the power to lay and collect taxes, etc., and the qualification of that power by the words, 'but all duties, etc., shall be uniform,' etc. The latter branch of the sentence as a qualification of the first should not have been separated by words which grant a distinct and independent power. Such a framing of the sentence so interpreted would be a vice in grammar of which the pen of Gouverneur Morris should not be held guilty where any other construction is open. The grammatical construction is vindicated by holding that the words 'to pay the debts,' etc., do not

create an independent power, but only declare the object of the preceding tax power.

"2nd. To pay debts can hardly be said to be a political power. To lay and collect taxes is a power, and a proper power, where its object is to pay the debts of the government; and, as these words 'to pay the debts' are indissolubly connected with the words to 'provide the common defense,' etc., it follows that these latter words must share the fate of the words to 'pay the debts,' and be taken to declare the object of the preceding power and not the creation of a distinct power." (Tucker on the Constitution, Vol. I, p. 470.)

IV.

The presumption against the construction of these words in their broad latitude as now sought in legislation, such as this Maternity Law, is found in the intense opposition at the time to the adoption of the Constitution in many of the States in the fear that the Federal powers contained in the Constitution would annihilate the States; and this fear was shown by seven States of the Union on ratifying the Constitution *offering* 126 *amendments to the same to limit Federal power, while not one of them refers to or mentions the "General Welfare Clause"* as one to be curtailed, amended or stricken out. How can this be explained, except on the theory that the watchful critics of Federal power, as contained in the Constitution, saw no such power in these words as is now claimed, and the men who made them—Madison and others—have testified none such were intended? This is shown in an extract from the letter of Mr. Madison to Mr. Stevenson, heretofore given in full:

"No less than seven States, it appears, concurred in adding to their ratifications a series of amendments, which they deemed requisite. Of these amendments, nine were proposed by the convention

of Massachusetts; five by that of South Caroline; twelve by that of New Hampshire; twenty by that of Virginia; thirty-three by that of New York; twenty-six by that of North Carolina; and twenty-one by that of Rhode Island.

"Here are a majority of the States, proposing amendments, in one instance thirty-three by a single State; all of them intended to circumscribe the power granted to the general government, by explanations, restrictions, or prohibitions, without including a single State referring to the terms, 'common defence and general welfare;' which, if understood to convey the asserted power, *could not have failed to be the power most strenuously aimed it, because evidently more alarming in its range, than all the powers objected to, put together.* And that the terms should have passed altogether unnoticed by the many eyes, which saw danger in terms and phrases employed in some of the most minute and limited of the enumerated powers, must be regarded as a demonstration, that it was taken for granted, that the terms were harmless, because explained and limited, as in the 'articles of confederation,' by the enumerated powers, which followed them."

V.

The outstanding fact that when the First Congress of the United States assembled, containing Members of the Federal Convention which proposed the Constitution, and also containing Members of the several State conventions which ratified the Constitution who knew from their service in such conventions the jealousy of the people against Federal powers that would consolidate the government and make it a centralized government, no amendment was offered in that Congress *referring to the "General Welfare" clause, to limit or annul it;* showing conclusively that at that date, with the tremendous hostility to the Constitution, they had no fear of this clause, for such construction had never occurred to any one as

possible after Hamilton's attempt in the Convention to get an equivalent clause in the Constitution had been so signally defeated.

The First Congress of the United States was composed of 92 Members, Senators and Representatives. Of that number, 51 had been members either of the Federal Convention which proposed the Constitution or of the conventions of the several States which ratified it. The character and ability of these men could not be questioned. The members of the Federal Convention who were members of this First Congress were:

Oliver Ellsworth William S. Johnson Roger Sherman	Connecticut
Richard Bassett George Read	Delaware
William Few Abraham Baldwin	Georgia
Daniel Carroll	Maryland
Tristam Dalton Caleb Strong Elbridge Gerry	Massachusetts
John Langdon Nicholas Gilman	New Hampshire
George Clymer Robert Morris Thomas Fitzsimons	Pennsylvania
Pierce Butler	South Carolina
James Madison	Virginia
William Paterson	New Jersey

The Members of the First Congress who were also members of the conventions in their several States that ratified the Constitution were as follows:

Charles Carroll, of Carrollton Joshua Seney William Smith Michael Jenifer Stone	Maryland
Tristam Dalton Caleb Strong Elbridge Gerry George Partridge Theodore Sedgwick	Massachusetts
John Langdon Samuel Livermore	New Hampshire
John Laurance	New York
John Steele Timothy Bloodworth	North Carolina
Thomas Hartley Fredk. A. Muhlenberg Henry Wynkoop	Pennsylvania
Joseph Stanton, Jr. Benjamin Bourn	Rhode Island
Ralph Izard Thomas Sumter Aedamus Burke William Smith	South Carolina
William Grayson James Monroe Richard Henry Lee Andrew Moore Alexander White James Madison, Jr. Theodoric Bland Isaac Coles	Virginia

Some of these men had been leaders in the Federal Convention. Many of them had been leaders in their State Conventions. Mr. Madison and a few others were in both the Federal Convention and their State Conven-

tions. They were all fully aware of the opposition to the Constitution in their several States and the fear of the Federal Government absorbing the rights and powers of the States. In New York, in Virginia, in North Carolina, in Rhode Island, the hostility was most pronounced, and the organization against its adoption most serious. Patrick Henry, who saw the "poison under its wing," in the Virginia Convention did once refer to the danger of the Welfare Clause. So complete was the answer of Mr. Madison and Governor Randolph that it was never heard of again. Many of them had come from States which had ratified the Constitution on the condition that amendments were to be made to it to secure, without doubt, their rights in the States. Their minds were keen to the situation, and yet the astounding fact is, with their anxiety to respond to the objectors and to those who had so vigorously registered their fears, that though a number of amendments were offered in that Congress, to be submitted to the States for ratification, *not one referred to the General Welfare Clause.* To sum up the argument, the Federal Convention in framing the Constitution had before it in concrete form two or more propositions giving exactly the same power to Congress which is now claimed under the General Welfare Clause. They were rejected. The seven States recited above proposed 126 amendments, but not one referred to the General Welfare Clause; and the first Congress that met, a majority of whom had been in either the Federal Convention or in their State conventions, proposed a number of amendments, *not one of which referred to the General Welfare Clause.* Could proof be stronger that, at least so far as the men who framed the Constitution and those who ratified it for the people in the States, never dreamed that such construction could be put upon it? What the Constitution meant when adopted, it means today. This doctrine has been

repeatedly affirmed by the Supreme Court. It is not subject to changing sentiment. It is the same yesterday, today and forever. So that if the men who proposed it, and the people who ratified it, proposed it and ratified it because it meant a certain thing and did not mean a certain other thing, neither disappointed ambition, nor ingenious and specious dissertations, nor humanitarian emotions, nor repeated congressional enactments can change that which is as fixed and immovable as the everlasting hills that are about us.

VI.

We will now submit the opinions of commentators, judges and writers on the Constitution on this question. Mr. Hamilton's view need not be given because it is well understood from his proposed plan of a Constitution for the United States; and in his report on manufactures in 1791 he gave the same broad construction to this clause and claimed that Congress could appropriate money for any purpose which in its judgment pertained to the "common defense and general welfare."

Judge Story is the most conspicuous advocate of that doctrine among the commentators, but it is difficult to see how that distinguished author can arrive at such conclusion after reading the following passages from his great work:

In Story on the Constitution, page 628, Section 907:

> "Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons, on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words, 'to lay and collect taxes, duties, imposts and excises,' constitute a distinct, substantial power; and the words, 'to pay the debts and provide for the

common defence, and general welfare of the United States,' constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them? This has been a topic of political controversy; and has furnished abundant materials for popular declamation and alarm. *If the former be the true interpretation, then it is obvious, that under color of the generality of the words to 'provide for the common defence and general welfare,' the Government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers; if the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'to pay the debts and provide for the common defence and the general welfare.'*"

And further (page 630) he says:

"Section 909. The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers. This is apparent, as will be presently seen, from the history of the proceedings of the convention which framed it; and it has formed the admitted basis of all legislative and judicial reasoning upon it, ever since it was put into operation, by all, who have been its open friends and advocates, as well as by all, who have been its enemies and opponents. If the clause, 'to pay the debts and provide for the common defence and general welfare of the United States,' is construed to be an independent and substantive grant of power, it not only renders wholly unimportant and unnecessary the subsequent enumeration of specific powers; but it plainly extends far beyond them, and creates a general authority in Congress to pass all laws, which they may deem for the common defence or general welfare. Under such circumstances, the Constitution would practically

create an unlimited national government. The enumerated powers would tend to embarrassment and confusion; since they would only give rise to doubts, as to the true extent of the general power, or of the enumerated powers.

"910. One of the most common maxims of interpretation is (as has been already stated), that, as an exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated. But, how could it be applied with success to the interpretation of the Constitution of the United States, if the enumerated powers were neither exceptions from, nor additions to, the general power to provide for the common defence and general welfare? To give the enumerations of the specific powers any sensible place or operation in the Constitution, it is indispensable to construe them, as not wholly and necessarily embraced in the general power. The common principles of interpretation would seem to instruct us, that the different parts of the same instrument ought to be so expounded, as to give meaning to every part, which will bear it. Shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the more doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification? *For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural or common, than first to use a general phrase, and then to qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain, nor qualify the general meaning, and can have no other effect, than to confound and mislead, is an absurdity, which no one ought to charge on the enlightened authors of the Constitution. It would be to charge them either with premeditated folly, or premeditated fraud.*"

These views of Judge Story show most conclusively that the words "common defence and general welfare," in his opinion, do not constitute a substantive grant of power, but are merely a limitation upon the power of taxation, which must be for "the common defense and general welfare." Up to this point Judge Story and Mr. Madison concur, but from this point they diverge; and Judge Story holds that though Congress has no power under these words to legislate for "the common defense and general welfare," that Congress has the power to appropriate money for objects which may contribute to "the common defense and general welfare," and which are not embraced in the subsequent grants specifically given to Congress. When Judge Story says (Section 909):

> "The Constitution was, from its very origin, contemplated to be the frame of a national government, *of special and enumerated powers, and not of general and unlimited powers.*"

Could language be stronger? Could Madison, or Jefferson, or Cooley, have stated it stronger? The Judges, in all of their decisions use the same language, that the United States Government is one of "enumerated powers." Note the plural! Not one, large, sweeping, consuming power that embraces all, but the powers, and those only, enumerated in the Constitution as belonging to Congress and none other. If the Government of the United States is forbidden to legislate except, as Judge Story says, for subjects embraced in the enumerated powers, by what process of reasoning can he arrive at the conclusion that that government which cannot legislate to create an organism for "the general welfare" can allow some other power (the State) that has the right, to create it, and then by appropriation support and maintain it. Would such a government be one of

"limited powers"? Would it not be a government of unlimited powers, which Judge Story says was never intended to be the scope of our government? When he holds that these words do not constitute a substantive grant of power, it would seem his whole argument falls, for the power to support by appropriation is just as much a substantive power as if Congress attempted to create originally the organism which it now attempts to support by its appropriations. The doctrine which Judge Story says is accepted as true by all that the Federal Government is one of "special and enumerated powers," and not of "general and unlimited powers," is a mockery and a delusion, if the words "general welfare" denied by him to constitute a substantive grant of power can be so utilized by metaphysical legerdemain to give the Federal Government the power to do everything which it could have done had those words, in his judgment, constituted a substantive grant of power.

Pomeroy follows Judge Story, and is in accord with his views.

Mr. Madison, in the Federalist No. 41, discusses this question:

> "Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the Constitution on the language in which it is defined. It has been urged and echoed that the power 'to lay and to collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections than their stooping to such a misconstruction.

"Had no other enumeration or definition of the powers of the Congress been found in the Constitution than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. A power to destroy the freedom of the press, the trial by jury, or even to regulate the course of descents, or the forms of conveyances, must be very singularly expressed by the terms 'to raise money for the general welfare.'

"But what color can the objection have when a specification of the objects alluded to by these general terms immediately follows; and is not even separated by a longer pause than a semicolon? If the different parts of the same instrument ought to be so expounded as to give meaning to every part that will bear it, shall one part of the same sentence be excluded altogether from a share in the meaning; and shall the doubtful and indefinite terms be retained in their full extent, and the clear and precise expressions be denied any signification whatsoever? For what purpose could the enumeration of particular powers be inserted if these and all others were meant to be included in the preceding general power? Nothing is more natural and common than first to use a general phrase, and then to explain and qualify it by a recital of particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity which, as we are reduced to the dilemma of charging either on the authors of the objection or on the authors of the Constitution, we must take the liberty of supposing had not its origin with the latter.

"The objection here is the more extraordinary, as it appears that the language used by the convention is a copy from the Articles of Confederation. The objects of the Union among the States, as described in Article III. are, 'their common defense, security of their liberties, and mutual and general welfare.' The terms of Article VIII are still more identical:

'All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress, shall be defrayed out of a common treasury, etc. A similar language again occurs in Article IX. Construe either of these Articles by the rules which would justify the construction put on the new Constitution, and they vest in the existing Congress a power to legislate in all cases whatsoever. But what would have been thought of that assembly, if, attaching themselves to these general expressions, and disregarding the specifications which ascertain and limit their import, they had exercised an unlimited power of providing for the common defense and general welfare? I appeal to the objectors themselves, whether they would in that case have employed the same reasoning in justification of Congress as they now make use of against the convention. How difficult it is for error to escape its own condemnation."

In his veto message of March 3, 1817, Mr. Madison, also discussing this question, used the following language:

"To refer the power in question to the clause 'to provide for the common defense and general welfare' would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers, which follow the clause, nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one, hitherto understood to belong to them, the terms, 'the common defense and general welfare,' embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and the laws of the several States, in all cases not specifically exempted, to be superseded by laws of Congress, it being expressly declared 'that the Constitution of the United States, and the laws made in pursuance thereof, shall be the supreme law of the

land, and the judges of every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participating in guarding the boundary between the legislative powers of the General and the State governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are susceptible of judicial cognizance and decision. A restriction of the power 'to provide for the common defense and general welfare' to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of government, money being the ordinary and necessary means of carrying them into execution."

John Randolph Tucker on the Constitution, Vol. I, page 477, says:

"The point of divergence is, that Madison holds the words 'common defense and general welfare' as a general description of the objects of the tax-power, limited by and commensurate with the objects of the Constitution as defined in the enumerated powers thereafter specified; and that there can be no 'common defense and general welfare' intended by the Constitution beyond what Congress has power to create, regulate and control by virtue of the enumerated grants. *E contra,* Hamilton holds that the words 'common defense and general welfare' include two classes of objects. First, those which are within the scope of the subsequently enumerated grants of power; and second, all others that Congress may deem to be for the 'common defense and general welfare.' "

And he further says (Vol. I, page 478):

"It would really seem absurd to impute to the framers of the Constitution a purpose to comprehend objects far beyond the powers it conferred upon the

government. It is argued everywhere in the *Federalist* that power ought to be commensurate with purpose. But this construction, insisted on by Hamilton and his followers, would indicate that the Constitution contemplated the unlimited expenditure of money, to be raised by taxation under governmental power, to carry out objects which were not within the control given, or the powers committed to, Congress. Power and purpose were not commensurate, except that by this construction Congress had unlimited discretion to raise and expend money by taxation, to aid and accomplish purposes and objects that were beyond the power of Congress to effect; which involves the conclusion that the Constitution trusted Congress to spend money for objects which might be regulated and controlled by other governments, but would not trust Congress to create and regulate these objects of appropriation. In other words, Congress cannot make and control a railroad; but it may raise and appropriate money for the benefit of a corporation that is to regulate and control it. Such a construction of the Constitution is anomalous. It gives an unlimited power of raising money, to be expended at the discretion of Congress, upon any and all schemes which Congress might deem for the 'common defense and general welfare,' although such schemes Congress is not empowered to project or to carry into execution by any power delegated to it.

"If, under the Tenth Amendment of the Constitution, a specific power to do a particular thing is not delegated to the United States by the Constitution, then it is reserved to the States. Such a thing is in no way within the control and discretion of the United States. If it be within the words 'common defense and general welfare,' still, as those words grant no power, Congress cannot exercise it. And yet, despite this, the construction contended for would give to Congress unlimited power to spend any amount of money to carry out a project or scheme clearly and only within the reserved powers of the States. Is it legitimate to give to the power of

taxation, which is ordinarily but a means for effecting the purposes of power, the larger function of unlimited discretion in selecting objects not within the delegated power as the recipients of the benefactions of revenue? Is it legitimate thus indirectly to carry into effect an ungranted power—a power which, being ungranted and if not prohibited to the States, is reserved to them? Is not this a usurpation by indirection, through taxation, as flagrant as if it were a bald exercise of the ungranted power? Judge Story says that this construction is conformable to the proposition 'to legislate in all cases for the general interests of the Union.' But that proposition was never adopted, and was rejected. Is it legitimate, then, to conform the construction of the words 'to provide for the common defense and general welfare' to a purpose which was proposed and rejected? It is true that Mr. Hamilton, in his draft of a Constitution, proposed that Congress should have 'power to pass all laws whatsoever, subject to the negative hereafter mentioned,' and that the President should have power to negative all laws passed in the State by a Governor or President, who shall be appointed by the general Government. Again, in Article VII of his scheme of a Constitution, he proposed that 'the Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and general welfare of the Union.' But this proposition of Mr. Hamilton was displaced by the provision of the Constitution which clearly enumerated the powers delegated to Congress."

And further, on page 480, Mr. Tucker says:

"If Congress can thus by appropriation exercise this power, it would indirectly exercise a power not granted, and since denied to it. If so, what use would there be for the Tenth Amendment or for Article I, Section 1, of the Constitution? It is an anomaly to hold that any government can raise money except as a means to execute its own power. Taxation is a great power; but in itself it does nothing except as

it is a means for doing that which is within the powers to be carried out by a government. That a government should have this great means to execute the powers of other governments reaches the point of absurdity. Why should government be given the means to execute a power which is denied to it and confided to another? Why give it the power to help another to do what is denied to it? If Congress cannot be trusted with the grant of a power, why give unlimited discretion to Congress to raise money to enable one not entrusted with the power by Congress to perform it? Can such folly be attributed to the framers of the Constitution? It is obvious that the mass of powers which Congress would thus exercise by means of its revenue powers are powers which are reserved to the States; for the powers not delegated to the United States, unless prohibited to the States, are reserved to them. Thus it would follow that the revenue to be expended by Congress under this construction would be expended for the execution of powers which were reserved to the States. The effect then would be, that while Congress is denied the particular power, it could effectually execute the power and invade the domain of State reservation by the expenditure of money; and conditioning the expenditure of money upon the substantial concession of power would, through money, virtually absorb the autonomy of the States and consolidate the whole governmental system into centralism."

Judge Cooley's views on this subject are well expressed in his Constitutional Limitations, page 11, as follows:

"The general purpose of the Constitution of the United States is declared by its founders to be, 'to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.' To accomplish *these purposes,* the Congress is empowered by the eighth section of Article I:

"(1) To lay and collect taxes, etc.

"(2) To borrow money, etc.

"(3) To regulate commerce, etc."

enumerating the seventeen specific grants of power in this Article. Judge Cooley thus limits 'the general welfare' to the specific enumerated powers.

Judge Cooley may again be quoted:

> "General Expenses of Government.—Every government must provide for its general expenses by taxation; and in these are to be included the cost of making provision for those public needs or conveniences for which, by express law or general usage, it devolves upon the particular government to supply. As regards the Federal Government, a general outline of these is to be found in the Federal Constitution. That government is charged with the common defense of the Union, and for that defense it may raise and support armies, create and maintain a navy, build forts and arsenals, construct military roads, etc. It has a like power over the general subject of post offices and post-roads, and over *other subjects enumerated in the Federal Constitution and subjected to its authority.* It may contract debts, and it must provide for their payment. For *all national purposes* it may levy taxes, and its power in so doing to select the subjects of taxation and to determine the rate and the methods is as full and complete as can exist in any sovereignty whatsoever, with the exceptions which are prescribed by the constitution itself." (Cooley on Taxation, 2nd Ed., page 110.)

Judge Miller (Miller on the Constitution, page 229, Note 2) says:

> "In the transcript of the Constitution as printed in the Revised Statutes, p. 19, there is only a comma after the word 'excise,' which was the end of the clause in the first draft when reported in the convention, a semicolon only appearing after the following

word 'States.' The same is also true of the carefully corrected copy found in Hickey's Constitution. It would appear, therefore, that the proper value to be attached to this clause and its true meaning, as intended by the wise and learned framer of this instrument, are best exemplified by considering the latter part of the clause as a limitation upon the power given by the opening words. Story in his work on the Constitution prints it in the same way, but remarks, Section 912, that in the revised draft in the convention there was a semicolon and paragraph as in the other cases; that it so stands now in some copies, and *it is said* so stands in the official copy, with a semicolon interposed. In the Federalist this punctuation is referred to, and, referring to the complaint that the language amounts to an unlimited commission to exercise every power which may be alleged to be necessary, it is asked 'what color can the objection have when the specification of the objects alluded to by these general terms immediately follows; and is not even separated by longer pause than a semicolon?' " (Federalist No. 41, Hallowell ed.; 40 Dawson's ed.)

Willoughby, who has published one of the latest and one of the ablest commentaries on the Constitution, says:

"Especially by those who desire to magnify the powers of the Federal Government it has been argued that instead of construing Section 8, of Article I as simply the grant of authority to raise revenue in order to pay the debts and provide for the common defense and general welfare of the United States, it should be interpreted as conferring upon Congress two distinct powers; namely, (1) the power of taxation; and (2) the power to provide for the common defense and general welfare. And, under the latter of these two grants, it has been argued that the Congress has the authority to exercise any power that it may think necessary or expedient for advancing the common defense or the general welfare of the United States. It scarcely needs be said that the interpretation has not been accepted by the courts.

Were this view to be accepted the government of the United States would at once cease to be one of the enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced."

Mr. Jefferson's view is strongly stated in his opinion on the power of Congress to establish the bank of the United States. (February 15th, 1791.)

"To lay taxes to provide for the general welfare of the United States, that is to say, 'to lay taxes *for the purpose* of providing for the general welfare.' For the laying of taxes is the *power*, and the general welfare the *purpose*, for which the power is to be exercised. Congress are not to lay taxes *ad libitum*, for any purpose they please; but only *to pay the debts, or provide for the welfare of the Union.* In like manner they are not *to do anything they please*, to provide for the general welfare, but only *to lay taxes* for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and, as they would be the sole judges of the good or evil, it would also be a power to do whatever evil they pleased. It is an established rule of construction, where a phrase will bear either of two meanings, to give it that which will allow some meaning to the other parts of the instrument, and not that which will render all the others useless. Certainly, no such universal power was meant to be given them. It was intended to lace them up strictly within the enumerated powers, and those without which, as means, these powers could not be carried into effect. It is known that the very power now proposed *as a means*,

was rejected *as an end* by the Convention which formed the Constitution."

Hare (American Constitutional Law, Vol. I, pages 242-243) says:

"A government authorized to provide for the common defense and general welfare is virtually absolute, because it must determine what means are requisite for the end in view, and its decision will necessarily be binding on the Courts. If such were really the meaning of the clause under consideration, the Tenth Amendment, that 'powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the State respectively, or to the people,' would have no real significance, since when all has been in effect given, there can be nothing to withhold; and the concluding words would supersede the first or render them superfluous, because the duty to provide for the common defense and general welfare would imply the right to tax as indispensable to its fulfillment." * * *

"The field of controversy is thus narrowed; but there is still room for doubt. Is the clause an authority to raise money, and consequently to appropriate it, for any purpose which Congress may deem conducive to the common defense or general welfare? Or does it merely authorize the laying and collection of taxes for the execution of the enumerated powers? The former is the literal import of the words employed, and merely sanctions what would be implied under every form of government *but our own;* that is the right to expend the public revenue for any purpose that may be deemed conducive to the public good." * * *

"This view is nevertheless open to objections as carrying the power of taxation beyond the verge of the Constitution, and authorizing the government to take money from the citizen for uses which it cannot accomplish in its sovereign capacity, and which are, on the contrary, reserved to the several States. The

> right of providing for popular education confessedly belongs to them, and not to the United States; and yet the latter may, if the Hamiltonian argument is sound, lay taxes with the view of endowing public schools which it can neither establish nor regulate." * * *

It is of special interest to find that Von Holst, one of the strongest advocates of a strong and centralized government, finds himself unable to indorse Judge Story's view of this question. On page 118 of his Constitutional Law of the United States he says:

> "Further restrictions of the right of taxation result from the fact that Congress can exercise it only for the fulfillment of the objects enumerated. The expression 'general welfare' is indeed so comprehensive and vague that the discretion of Congress is given the widest play. But however much this expression may be stretched, the mention of the three general purposes makes it certain that, for other purposes, no federal taxes can be levied. There are certain bounds, more or less clearly marked, within which the right of taxation unquestionably cannot be exercised. Above all, everything which comes exclusively within the jurisdiction of the States must be left alone by Congress." (Gibbons vs. Ogden, Wheaton, IX, 199.)

Practically every judge on the Supreme Court bench has referred to this government as one of "enumerated powers." That expression could not have been used if the words "the general welfare" embraced *all powers*. Why refer to a government of "enumerated" powers when one power among the number contained all others? Judge Marshall, in McCulloch vs. The State of Maryland, 4th Wheat. 314, says:

> "This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would

seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

And Judge Marshall, as a member of the Virginia Convention called to ratify the Constitution of the United States, in speaking of the powers of the States and the general government over the militia, used this language:

"The State governments did not derive their powers from the General government. But each government derived its powers from the people; and each was to act according to the powers given it. * * * Could any man say that this power was not retained by the States, as they had not given it away? For does not a power remain until it is given away? The State legislatures had power to command and govern their militia before, and have still, undeniably, unless there be something in this Constitution that takes it away. * * * There are no negative words here. It rests, therefore, with the States. * * * All the restraints intended to be laid on the State governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section of the first article. * * * The power of governing the militia was not vested in the States by implication; because being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been; and it could not be said that the States derived any powers from the system, but retained them, though not acknowledged in any part of it."

Also in Gibbons vs. Ogden, 9th Wheat. 1, speaking of the reserve powers of the States, he said they represented:

"that immense mass of legislation, which embraces everything within the territory of a State, not sur-

rendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, *health laws of every description*, as well as laws for regulating the internal commerce of a State."

The decisions of the Courts are full of such expressions, but I shall insert one other—a quotation from the opinion of one of the greatest Judges, in my opinion, who ever sat upon the bench, Justice Brewer, who in Kansas vs. Colorado, 206 U. S. 89-91, said:

"Appreciating the force of this, counsel for the Government relies upon 'the doctrine of foreign and inherent power,' adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the Court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the State or the National Government; no legislative powers belong to a State government, other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specific things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure *of a supposed general welfare, attempt to exercise powers which had not been granted. With equal*

determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit: 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'we, the people of the United States,' not the people of one State, but the people of all the States, and Article X reserved to the people of all of the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all of the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution under which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

If Judge Story's construction of the words "the general welfare" be correct, is it not of more than passing

interest that in the history of the Supreme Court, covering more than one hundred and thirty years, no case can be produced in which the Court rests its judgment upon the power of Congress to appropriate money for any object which they might deem for the general welfare of the people?

The citations above given show on the one hand that the American commentators, Judge Story and Pomeroy, sustain Mr. Hamilton's view, and Mr. Monroe's name can be added to this number, although he certainly did not go as far as Judge Story, that Congress has the right to appropriate money for any purpose, State or National, which they might deem for the general welfare; he clearly states his view as follows (Internal Improvements, May 4, 1822):

> "If, then, the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their powers, respectively, is there no limitation to it? Have Congress a right to raise and appropriate to any and to every purpose according to their will and pleasure? They certainly have not. The Government of the United States is a limited government, instituted for great national purposes, and for those only. Other interests are committed to the States, whose duty it is to provide for them. Each government should look to the great and essential purposes for which it was instituted and confine itself to those purposes."

After this statement could anyone think that Mr. Monroe was of opinion that Congress could legislate to affect or control matters which were exclusively in the control of the States, and grant appropriations to them?

On the other hand, Mr. Madison, Mr. Jefferson, Willoughby, Von Holst, Cooley, Hare, Judge Miller, Chief

Justice Marshall and Tucker hold to the contrary. Judge Marshall may, with confidence, be placed among the latter number from the following extract from his opinion in Gibbons vs. Ogden, 9th Wheat. 1, 198-99, where he is discussing the power of taxation by Congress and the States:

> "Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. *Congress is not empowered to tax for those purposes which are within the exclusive province of the States.* When, then, each government exercises the power of taxation, neither is exercising the power of the other."

If Congress cannot tax for State purposes, who among us will hold that it may *appropriate* money for State purposes? Congress is not obliged, in levying a tax, to state the objects for which such tax shall be used, for it is presumed they are levied for National objects; so if Congress appropriates money, raised for National objects, for State purposes, it is a clear breach of trust.

Judge Marshall's position is sanctioned by Tucker as follows:

> "Therefore, though Congress might deem that the exercise of a State power was in a certain sense for the 'common defense and general welfare,' it could not exercise it because the purpose was in the exclusive province of the States, and reserved to them, because not delegated to the United States." (Tucker on the Constitution, Vol. I, page 481.)

VII.

We are often met by proponents of this law with the statement that the "General Welfare" clause, without regard to its original validity, has become valid from its accepted use and exercise by Congress, and numerous instances are given of measures which are said to have no other standing than this claim of power.

The first measure to which usually attention is called is the 50-50 appropriation by Congress for roads in the States, and this is claimed to be done under the "General Welfare" clause. Whether such a policy is advisable or not is one question, but the power of Congress to act is not justified under the "General Welfare" clause, but under the war power and the power to establish post offices and post roads. Numerous bills were discussed in the early history of the Country involving this principle, among them, the Cumberland Road Bill; and while the sentiment was by no means unanimous on the proposition, it has always had strong advocates, and, in Congress, sometimes a majority in its favor.

> "In 1817, President Monroe, in his annual message, denied the constitutionality of such legislation, but recommended an amendment to the Constitution allowing such. That portion of his message was referred to a special committee of the House, of which Judge Henry St. George Tucker, of Virginia, was chairman.
>
> "The report (See Annals of Congress, pp. 451-460) sustained the following propositions:
>
> " 'That Congress has the power, 1. To lay out, improve, and construct post roads through the several States, with the assent of the respective States; and 2. to open, construct, and improve military roads through the several States, with the assent of the respective States. 3. To cut canals through the several States with their assent, for promoting and

giving security to internal commerce, and for the more safe and economical transportation of military stores, etc., in time of war; leaving in all these cases the jurisdictional right over the soil in the respective States' (page 458);

"And on March 10, 1818, as a result of this report, the following resolutions were adopted by the Committee of the Whole House on the State of the Union:

" 'Resolved, That Congress has power, under the Constitution, to appropriate money for the construction of post roads, military and other roads, and of canals, and for the improvement of water caurses. (Ayes 78, noes 58.)

" 'Resolved, That Congress has power, under the Constitution, to construct post roads and military roads; provided that private property be not taken for public use without just compensation. (Ayes 76, noes 70.)

" 'Resolved, That Congress has power, under the Constitution, to construct roads and canals necessary for commerce between the States; provided that private property be not taken for public purposes without just compensation. (Ayes 70, noes 69.)

" 'Resolved, That Congress has power, under the Constitution, to construct canals for military purposes; provided that no private property be taken for any such purpose without just compensation being made therefor. (Ayes 75, noes 63.).'

"When these resolutions were brought into the House on March 14, the first was adopted by a vote of 90 to 75; the second was defeated by a vote of 82 to 84; the third was defeated by a vote of 71 to 95; the fourth was defeated by a vote of 81 to 83.[1]" (Tucker's Woman Suffrage by Constitutional Amendment, pp. 153-154-155, Yale Univ. Press.)

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[1] Annals of Congress, pp. 1385-1389.

While all four of the above resolutions passed the Committee of the Whole House, only one, the first, when brought into the House, received a majority, though the vote on the others was very close in the House. I have never doubted the power of Congress to make such appropriations under the above first, second and fourth resolutions, but have had doubts of its power under the third resolution.

We are constantly met also with the claim that the Morrill Act of 1862, establishing agricultural colleges, was passed under the "General Welfare" clause, and that the principle has been broadened from time to time. Without going into this question exhaustively, I beg to submit the following facts in reference to the Western territory ceded to the United States by Virginia. On the 10th of October, 1780, Congress passed the following resolution:

> "Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of *for the common benefit of the United States,* * * *.
>
> "That the said lands shall be granted or settled at such times and *under such regulations* as shall hereafter be agreed on by the United States in Congress assembled, or in nine or more of them." (Journals of Congress, No. 6, page 145.)

Theodoric Bland, Edmund Randolph and James Madison were among those who represented Virginia at that time in the Congress.

The resolution of Congress of September 6, 1780 (Journals of Congress No. 6, page 123) urged the States that had claims on the Western territory to yield them and

convey the land to the United States. In compliance with this resolution, Thomas Jefferson, S. Hardy, John F. Mercer, Arthur Lee and James Monroe, duly appointed by the General Assembly of Virginia, being members of the Continental Congress from Virginia, conveyed the northwest territory belonging to Virginia to the United States on the first day of March, 1784. (See Henning's Statutes at Large, 1782-4, Vol. II, page 571.) In this deed they convey "Unto the United States in Congress assembled, for the benefit of the said States, all right, title, and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being, to the northwest of the river Ohio, subject to the terms and conditions contained in the before recited Act of Congress the thirteenth day of September last," and so on.

And further the Deed of Cession contains the following (page 574):

> "That all the lands within the territory so ceded to the United States, and not reserved for or appropriated to, any of the before mentioned purposes, or disposed of in bounties to the officers and soldiers of the American army, shall be considered *as a common fund* for the use and benefit of such of the United States as have become, or shall become, members of the confederation or Federal alliance of the said States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."

On Friday, May 20, 1785, Congress passed

> "An ordinance for ascertaining the mode of disposing of lands in the Western territory:

> "Be it ordained by the United States in Congress assembled, that the territory ceded by individual States to the United States, which has been purchased of the Indian inhabitants, shall be disposed of in the following manner."

Minute directions are given to surveyors as to how to lay out plots of townships in the territory, and among the provisions in this ordinance is the following:

> "There shall be reserved for the United States out of every township, the four lots, being numbered 8, 11, 26, 29, out of every fractional part of a township, so many lots of the same number as shall be found thereon, for future sale. There shall be reserved the lot No. 16, of every township, for the maintenance of public schools, within the said township, and so forth." (Journals of Congress No. 10, pages 118-121.)

This ordinance was passed in compliance with the resolution of Congress of October 10, 1780, which gave Congress the power to grant such lands under such regulations as they might agree upon. By Virginia's deed a trust power was conferred upon the Congress by Virginia for all the States of the Union and all that might come into the Union. The Congress accepted the trust with the declaration that it was to have the power to dispose of the lands at *such times and under such regulations as they deemed fit.* Virginia, knowing these facts, conveyed accordingly. This trust duty which rested on Congress was naturally assumed by the United States of America when the Constitution was adopted, and this Constitution recognized such trust obligations, for Article VI declares:

> "All debts contracted and engagements *entered into,* before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation."

So the United States accepted the trust which expired with the expiration of the Confederation, and declared in Article IV, Section 3, how this trust should be administered:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The Congress of the Confederation had indicated by the ordinance of May 20, 1785, that under power given it by the resolution of October 10th, 1780, to convey this land under such regulations as they deemed fit, they would impress it with the obligation of supplying the people of the infant Republic with education. This is clearly seen in the above Ordinance of May 20, 1785, wherein lots numbered 8, 11, 26 and 29 were reserved for the United States *"as a common fund"* for all of the States (Virginia's Deed of Cession), and the same paragraph which reserves the above to the United States resolves "lot No. 16 to every township for the maintenance of public schools, within the said township." Why in the same paragraph are lots 8, 11, 26 and 29 reserved to the United States generally and lot 16 reserved to the township for educational purposes? Because the latter was to remain in the township for township purposes which Congress could prescribe under the above resolution of Congress of October 10, 1780, while the former were to be distributed or granted, under Virginia's deed, proportionately; and lots 8, 11, 26 and 29 in one State under this proposition might go to another State in the proportional distribution. When lot 16 was reserved expressly for educational purposes, Congress made known the "regulations agreed on by the United States in Congress assembled" which may apply to all public land not otherwise provided for, and, as far as can be ascertained, the Ordinance of May 20, 1785, had not been

repealed when the Constitution of the United States became operative in which all agreements of the Congress of the Confederation were taken over under the Constitution of the United States. Congress followed up this principle by law March 3, 1803. In 1826 on the ~~Louisiana~~ purchase, and in 1848 on the acquired Oregon territory. This trust duty, thus impressed, became one of the "engagements" which it became our duty, under the Constitution, to live up to; and when Congress, in the Morrill Act, dedicated a part of the same lands to agricultural education, it was but executing an agreement which came to it from the old Congress and which had been executed by that Congress under the ordinance of October 10, 1785, for educational purposes. Therefore, grants of public lands for educational purposes are only fulfilling the trust duty imposed upon the United States Government when it agreed to fulfill all "engagements entered into" by the Confederation (Article VI C. U. S.). The United States, under the Confederation, impressed public lands with an *educational trust*. They had a right so to do, and as their successors we can and have carried it out.

The above are the two cases that are most commonly cited as endorsing the doctrine proclaimed in this Maternity Law, when, as seen, they have been maintained on different principles.

Recurring now to the discussion of the subject under VII:

Judge Cooley, in his Constitutional Limitations, after discussing some cases such as Stuart vs. Ladd, 1 Cranch 299, and others referring to this doctrine, says (page 106, 7th Ed.):

> "It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the Judges sufficient doubt upon the question of

its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. *Acquiesence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution,* and appointed judicial tribunals to enforce it. A power is frequently yielded to *merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition,* without the mischief which the Constitution was designed to guard against appearing, or without anyone being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution."

(See also Bronson, Ch. J., in Oakley vs. Aspinwall, 3 New York 568.)

The argument drawn from this proposition is that continued *wrong,* if persited in, will become *right.* The argument may be presented thus: Here is a law passed by Congress one hundred years ago which today, all parties would agree, is unconstitutional. It could only be set aside by being brought to the Supreme Court and tested there. Very few laws of Congress get to the Supreme Court. This specific law, not having been declared void, remains upon the statute book. It is followed by another equally notorious in its unconstitutionality, and by another. How often must this repetition of lawlessness occur to constitute lawfulness? How many infractions of the law are necessary to constitute the law-breaker a law observer? Must we "continue in sin that grace may abound? God forbid!" How often can a man commit murder and go unchallenged because he escapes detection, and finally be able, when caught, to claim his innocence because not prosecuted for the previous twenty murders he has committed? Can the bootlegger claim immunity from punishment when caught because he suc-

cessfully eluded the officers of the law for months and was never punished, or can his unpunished trips, on which he was never caught, save him from punishment when he is caught? Could such a plea be admitted in any Court, that because a prior violation of law has gone unwhipped of justice the commitment of another can wipe out the former stain and make the last an act of innocence? In the practical operation of Congress, when a member desires the passage of a bill which he feels sure is not constitutional, he looks for a precedent. That precedent may be admittedly unconstitutional, but he feels as if he were in a haven of safety if only he can find a precedent. That precedent has never been tested by the Courts. The member himself may regard it as unconstitutional, but because it has escaped the Courts he tries it, hoping his bill will likewise escape.

District Judge Rogers has met this question with judicial emphasis:

> "No case has been cited tracing the power to enact any statute to the general welfare clause above quoted, and I do not believe any can be. The learned counsel, in this connection, has cited various acts of Congress of a nature quite similar to the one in question, *but no number of statutes or infractions of the Constitution, however numerous, can be permitted to import a power into the Constitution which does not exist, or to furnish a construction not warranted.* They, too, must stand or fall, when brought in question, by the same principles which are to be applied alike in all cases" (Rogers, J., United States vs. Boyer, 85 Federal Report). (See also Brewer, J., in Fairbank vs. United States, 181 U. S. 310.)

The vice of this whole question lies in the fact that all laws are not, and cannot be, passed upon by the Supreme Court, and Congressmen, in their eagerness to satisfy the demands of their constituents, are sometimes willing

to satisfy them by passing such bills, often plainly unconstitutional, in the hope that they will never reach the Supreme Court; and then, when not contested, they remain on the statute books as examples to be followed. In the moral and in the political world there is a common principle, and that principle is well expressed by the poet:

> Vice is a monster of such hideous mien
> That, to be hated, needs only to be seen!
> But as we grow familiar with its face,
> First we pity, then endure, *and then embrace.*

VIII.

Where appropriation of money is made by Congress to the States without reservation as to power to supervise or control the appropriation, or Congress relinquishes any control over moneys appropriated to the States, it is guilty of a breach of trust. This doctrine is emphasized by Black (Constitutional Law, 3rd Ed., page 287):

> "Nor could it (Congress) renounce or surrender any of the powers granted to it by the Constitution, whether to the other branches of the government, the States, or private parties.
>
> "Nor can it delegate the powers confided to it, or authorize their exercise by any other body or any person."

Tucker on the Constitution, Vol. I, page 484, refers to the same principle:

> "But if appropriated without reservation, then Congress would give away its discretion to another, to use the money so appropriated for the common defense and general welfare as that other might determine. This would be an unconstitutional abanbonment of duty and breach of trust."

The duties confided to Congress are trust duties. The great powers to lay and collect taxes and to appropriate

money are the highest trust duties; to use the power to gather money from the people by taxation, and then by appropriation give that money to a State without let or hinderance by Congress is an abandonment of a trust duty which no Court will sustain. If the money is appropriated to the State to carry out a purpose within the control of Congress, it is clearly an unauthorized abandonment of their duty to control the people's money, and if the money be appropriated to a State to carry out a purpose denied to Congress, their guilt is only enhanced. If the Federal Government retains partial control, this is equally unconstitutional, for "Congress cannot delegate the powers confided to it" at all. How can the United States Government surrender control of its own funds into the hands of another government and keep faith with the people as their chosen trustee? The people, in making our Constitution, never intended that the taxes wrung from them should be used and administered by another distinct government. No such condition was ever heard of in this country, except perhaps under the Eighteenth Amendment. It is equally an abandonment of a trust duty for Congress to give *up any control* of moneys entrusted to it. No trustee, charged with a duty, and accepted by him, can escape his responsibility under the trust who abandons his trust by surrendering it to another. Under this law, the State agency, if it fails to conduct it according to the views of the Board as they may think proper, or in a way that the Chief of the Children's Bureau objects to, the Board and the Chief can prevent the State getting money for the next year by withholding a certificate; but suppose the State agency, during the year complained of by the Board, squanders the money or commits a breach of trust, how can the Federal Government take action against a State officer who owes no duty to the Federal Government. To be perfectly frank, an examination of this law would seem to indicate

that the State has practically no control in its administration, and yet its last section declares, in large letters emphasizing the objects of this section.

> "STATE CONTROL OF ADMINISTRATION OF ACT.—This Act shall be construed as intending to secure to the various States control of the administration of the Act within their respective States, subject only to the provisions and purposes of this Act."

But as the previous provisions of the Act give the administration of it to the Children's Bureau of the Department of Labor, and make the Chief of that Bureau the Executive Officer, this provision as to State control would seem to be only "a sounding brass or tinkling cymbal."

Under Section 4 there is an intimation of co-operation between the two, but that is limited by the words "as herein provided." This is the only section that refers to co-operation, and the words "as herein provided," therefore, mean nothing. In other words, while in our judgment the State has no control of the administration of this Act, if the Court should hold otherwise and discover that it has a partial control by co-operation or otherwise, to the extent of that control, we hold it is a surrender by Congress of a trust power and this is illegal.

IX.

Congress can pass no law that changes our form of government, and the Courts will uphold no such law.

Black on Constitutional Law, 3rd Ed., page 287, says:

> "It is clear in the first place that Congress cannot pass any law altering the form or frame of the Government, curtailing the autonomy of the United States, or subjecting the Government to the influence or ascendency of any foreign power."

This principle is so clear that it hardly needs affirmation or discussion. A minute examination of the Maternity law, shows it to be clearly subject to this objection. Where ena be found in the Constitution any power looking to a division of responsibility between the United States Government and the State governments in carrying out one provision contained in it, except under the Eighteenth Amendment? The genius and the spirit of the instrument forbids it. So far from that being the case, with extreme care the powers of government were divided between the Federal Government and the States; powers of a national character were lodged with the one; those of a local character with the other; each was supreme in its own sphere with no power to interfere in the other. If so, under what authority can a law be passed which gives to the Federal Government power and influence over a subject confided to the States, or to the States a power and influence which has been granted to the Federal Government? An examination of this law will show its revolutionary character, and will show with equal clearness the attempted grant of power to the one or the other which is denied to it in the Constitution, or the exclusion of the one or the other from the exercise of a power granted to it. Neither can be admitted.

The doctrine is accepted by all, and has been affirmed over and over again by the Courts, that the States cannot trench upon the domain and powers of the Federal Government, and the latter cannot interfere with those objects which by the Constitution are left entirely to State control; each is powerless in the domain of the other. The Maternity law affects women in child bearing and the care of the child after it comes. Under our Constitution, we ask upon whom does this right or duty devolve? The State or the Federal Government? For-

tunately there can be no doubt on this question, for the recent child labor decisions of the Supreme Court settle it as to children, and the principle controlling these cases applies equally to child-bearing women.

Justice Day, in Hammer vs. Dagenhart, 247 U. S. p. 273, says:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.
>
> "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."
>
> "A statute must be judged by its natural and reasonable effect. Collins vs. New Hampshire, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. Pipe Line Cases, 234 U. S. 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.
>
> "In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. Lane County vs. Oregon, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. New York vs. Miln, 11 Pet. 102, 139; Slaughter House Cases, 16 Wall. 36, 63; Kidd vs. Pearson, supra. To sustain

this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States."

Justice Day's decision in the above case is affirmed and sanctioned by the opinion of the Court in Bailey vs. Drexel Furniture Company, decided May 15, 1922, wherein Chief Justice Taft says:

"The analogy of the Dagenhart case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a State, in order *to coerce them into compliance with Congress's regulation of State concerns,* the Court said this was not in fact regulation of interstate commerce, but rather that of State concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State government under the Federal Constitution."

And he further adds:

"It is the high duty and function of this Court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not entrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty even though it requires us to refuse to give

effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards."

See how the above principles have been violated in this law. The care of maternity and infant children might belong to either the State or Federal Government —not both, for if granted, it belongs to the Federal Government; if not granted and not prohibited to the States, it belongs to them, and the Supreme Court has decided that it belongs to the States. Then how can Congress act, and, as in this law, appoint the Childrens' Bureau (a Federal agency) in Washington as the controlling agency to administer this work which belongs to the States, and appoint its head as the chief executive administrator? Can a Federal officer enforce a State power? The Constitution with clearness keeps the power, State and Federal, distinct. There is no overlapping or merging of the two. This law seeks to give control of this subject to both State and Federal governments, when only one can act, and overrides every principle of constitutional limitation in its long stride to Socialism.

Under the Constitution, the subjects of maternity and child welfare belong to the States. How then can the United States Government take part in their control? The statement of the proposition is its answer.

To enforce a State duty by a Federal officer is to change our Constitution. In like manner, the State agency must report its activities to the Children's Bureau (a Federal bureau) for its ap-

proval, and if disapproved the State gets no money; that is, the Children's Bureau controls the State maternity agency, or a Federal agency controls a State agency. So that the Congress (as under this law) has no power to do this, for it changes the Constitution of the United States. If maternity and infants be under care of the State, no other power is competent to interfere with their care.

If the State agency co-operating with the Childrens' Bureau is to work out this problem *together,* is it not, to the extent of its activities, "subjecting the Federal Government to the influence of a foreign power," and is not the autonomy of the United States curtailed to the extent of the State's interposition and control? So that even if Congress had power under the General Welfare to appropriate money for this purpose, it could, not in doing so, change the Constitution, control its powers or subject it to the influence of a foreign power.

The object of this Maternity law is to conserve the health of women and children, the object of which commends itself to all right-thinking people; but who is to do it? Chief Justice Marshall, in an extract from his opinion in Gibbons vs. Ogden, 9th Wheat. 1, heretofore quoted, speaking of the reserved powers of the States, says they represent

> "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, *health laws of every description* * * *."

Can the location of the power to control the welfare of maternity and infancy be more clearly described than in this language of the great Chief Justice?

Another witness that ungranted powers remain with the States is George Bancroft. He says:

> "That all power not granted to the general government remained with the States was the opinion of every member of the Convention; but they held it a work of supererogation to place in the Constitution an express recognition of the reservation." (Bancroft's History of the United States Constitution, Vol. 2, page 91.)

The adoption of the Tenth Amendment only ratified what already existed.

X.

If Judge Story's and Mr. Hamilton's view of the construction of this clause be accepted as valid, this Maternity law is still open to the objection that it does not embrace the general welfare of the Union. Judge Story is very specific in pointing this out and showing that the welfare contemplated is that of all the people; not a part; not a section; not a class, but the whole people; and the appropriation carried by this law does not measure up to these requirements. It is an appropriation *on conditions*, not absolute; and the Congress makes as one of its conditions that there shall be a consideration for this appropriation, and that consideration is a contribution by the States of an equal amount to be given by the several States. In other words, this benefaction (if benefaction it be) is *purchased* by the States; and they cannot have it, unless they pay for it with a sum equal that given by the Federal Government. If Congress has the power, as is claimed, to provide for the general welfare of the people, surely that does not give Congress the power to *sell* that general welfare for a fixed price. In the days of her degeneracy it is said all things were for sale in Rome, political influence and offices, while every man was said to have his price, but it has

been left to the United States in the passage of this law to add an additional item to this catalogue of corruption, to wit: *the open sale of the benefactions of the Government of the United States.* The appropriation, therefore, under this bill does not extend to the people of all of the States, for it is upon conditions, and these conditions may never be complied with by some of the States. Indeed, it is stated that even now there are eight States of the Union that have not complied with the provisions of this bill. Does its application to Virginia, with New York and Massachusetts left out, make a general welfare? Or can its application to forty States with eight left out be considered the general welfare? When this law was passed, at that moment, what people of the United States could claim its benefits? None. What States received its benefactions? Not one. It does not contain a gift to all the States (general welfare) to be forfeited on a condition subsequent; but it is a gift to some, to those who on condition precedent accept its terms. But those who may accept do not make the "general welfare" *unless all accept,* and at this time, when this case is heard, eight States have not complied and one State is challenging it in the Courts. Can such be for the general welfare that requires *all* to receive its benefits? The object of the law is said to be to promote "the welfare and hygiene of maternity and infancy." What a field of endeavor arises before the mind in contemplating such a purpose. "The welfare and hygiene" of all the child-bearing women of the country through ten months of travail and labor and that of all the infant children from their birth to their majority causes those less brave and less daring than the proponents of this law to stand aghast at the proposition here presented. And what is meant by "the welfare and hygiene of maternity and infancy"?

When does it begin? And where does it end? In what does it consist? Those words open up a vista in

future appropriations that would cause a smile of derision to come when any shall speak despairingly of the present enormous debt of the Country. "General Welfare" of children!! Embracing all the children now living, or that shall be born in the future. Can any one doubt that education—mental, moral, physical—that proper oversight of the excesses of youth, the care of diet, the preservation of teeth, of eyes and of hearing, the removal of tonsils, the care of the nose and throat, must be provided, to meet the welfare of the child, to say nothing of vocational training and professional education and the valuable adjuncts which foreign travel and the acquisition of foreign languages would be in moulding the highest type of American citizenship?

XI.

Admitting the conclusion of Judge Story that the words "the general welfare" in Article I, Section 8, of the Constitution do not grant a substantive power to Congress, but do grant power to appropriate money for any purpose which Congress may deem wise, the Maternity law is unconstitutional.

The distinction is here made between the power of Congress to create and the power of Congress to appropriate money to build up and support that which has already been created. Under this construction, Congress would have no power to establish a university in one of the States, for that would be a substantive power, but Congress would have power to appropriate money to a university established in a State.. A further distinction must be noted as to the object for which the appropriation is made. Congress has power, by specific grant, to establish post offices, and, under it, may build a post office building in any State. Congress may thereafter appropriate money to that post office building to

keep it in repair, but it does that under the coefficient clause of the Constitution,

> "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, etc."

But if the object of the appropriation be one not given to the control of Congress under the Constitution, but belonging to the States, such an appropriation is not, under Judge Marshall's definition, *bona fide* appropriate. Mr. Hamilton has recognized this principle, which has been referred to in a former part of this paper.

This Maternity law is, therefore, open to the objection that it does not confine itself to the appropriation of money, *but in detail builds up a great organization* and then appropriates money to it. If this organization is to carry out a power that is given to Congress in the Constitution, there could be no objection to it. If this organization is to carry out by the joint action of the State and Nation a power which rests with the States, it must be declared unconstitutional and void because to the extent that the Federal Government undertakes the discharge of a State function, to that extent it is transgressing the limitations of the Constitution; *a fortiori*, if the organization is constituted by the Federal Government to carry out alone a State power, it is null and void. An examination of the law will show the completeness and extent of such organization.

The first section of the law provides that its object is to promote "the welfare and hygiene of maternity and infancy," and we are left to conjecture in inspecting other provisions of the bill what this means. It is as broad as human suffering and as general as human misery.

Section 3 provides for a Board of "Maternity and Infant Hygiene," to be composed of the chief of the Children's Bureau, the Surgeon General of the United States Public Health Service, and the United States Commissioner of Education. Their duties are quite limited, and only referred to in Sections 7, 8 and 11. The administration of the Act is given in two sections, Section 3 and Section 14.

Section 3 declares:

> "The Children's Bureau of the Department of Labor shall be charged with the administration of this Act, except as herein otherwise provided, and the Chief of the Children's Bureau shall be the executive officer."

Section 11 declares:

> "STATE CONTROL OF ADMINISTRATION OF ACT.
> "This Act shall be construed as intending to secure to the various States control of the administration of this Act within their respective States, *subject only to the provisions and purposes of this Act.*"

If there be any provision in the Act giving the States any control over its administration, I fail to find it. The State agency must use the money as the Children's Bureau approves or it will get no more the next year, and it is further specifically denied the right to use any of it for buildings or for maternity pensions, gifts, etc. If one is restricted in certain particulars in the use of money and is subject to the will and approval of another in its expenditure, he is not a free agent, but is merely the agent of the latter. These facts justify the conclusion that the Act is to be administered by the Children's Bureau.

Section 2 provides for continuing appropriation of five years of certain amounts to the several States on condition that,

> "an equal sum has been appropriated for that year by the legislature of such State for the maintenance of the services and facilities provided for in this Act."

And in order to secure the benefits of the Act, its provisions must be accepted by the legislative authority of the States (or by the Governor in certain cases), and the legislature must designate or authorize the creation of a State agency "with which the Children's Bureau shall co-operate as herein provided in the administration of the provisions of this Act," provided the State agency of health, if there be such, shall administer the provisions of this Act.

Section 8 requires that the above State agency of health shall "submit to the Children's Bureau detailed plans for carrying out the provisions of this Act within such State." These plans are to be subject to the approval of the Board. This gives the Board the absolute power of determining methods, procedure, etc., and compels the State agency to supply the State's money for uses to be approved by a Federal Board, and from which the State is excluded; and this is the more remarkable since the purposes of its uses ("the welfare and hygiene of maternity and infancy") is entirely under State control, and from which the Federal Government is excluded.

This shows the State agency cannot start in its work until the Children's Bureau shall approve its plan of operation, and the money appropriated to the State cannot be used by the State agency until such plans are submitted to the Children's Bureau and approved. Then Section 11 provides:

"Each State agency co-operating with the Children's Bureau under this Act shall make such reports concerning its operations and expenditures as shall be prescribed or requested by the Bureau. The Children's Bureau may, with the approval of the Board, and shall, upon request of a majority of the Board, withhold any further certificate provided for in Section 10 hereof whenever it shall be determined as to any State that the agency thereof has not properly expended the money paid to it *or the moneys herein required to be appropriated by such State for the purposes* and in accordance with the provisions of this Act."

It is seen from these Sections that not only must plans be submitted by the State agency that must meet the approval of the Children's Bureau, but that after such plans have been carried out by the State agency, unless their work meets the approval of said Bureau, the certificate for the next year will be denied that State and no money be given; but, *mirabile dictu!* the Children's Bureau, under the above provision, not only has the power to dictate the mode and manner of the expenditure of money for this purpose given by the Federal Government, but, by this Section, has the power to control the money *given by* the State and administered *by the State agency* for this purpose, as indicated in the words in italics above. Could mastery by one government over another be more complete than this? Here an agency of the Federal Government can first dictate the plan of action to be followed by the State agency, and though the plan may have been approved, yet, if its execution does not conform to the ideas of propriety of said agency, further appropriations by Congress will be denied the State; and this is followed by the astounding fact that the failure of the State agency to spend the State's money as the Federal Government's agency deems proper, will result in a failure to get a certificate for an appropriation for

the next year. Could Federal control over State functions and State agencies be more complete? If the care of maternity and infancy belongs to the State, can this law, which puts such care in charge of the Federal Goveriment, be constitutional?

Under Section 10, within sixty days after any appropriation authorized by this Act has been made, "the Children's Bureau shall ascertain the amounts that have been appropriated by the Legislature of the several States accepting the provisions of this Act, and shall certify to the Secretary of the Treasury the amounts to which each State is entitled under the provisions of this Act."

Section 12 provides that no money apportioned to the States under this Act shall be applied to the purchase, erection or repair of any building, or rentals of any buildings or lands, or "for the payment of any maternity or infancy pension, stipend or gratuity." No such prohibition is made as to the funds appropriated by the Federal Government. Why? Is it because there may be already on the calendars of Congress bills looking to that end?

Sections 6 and 7 provide for the expenses or administration, and while limiting this to an amount "not to exceed five per centum of the additional appropriations authorized for any fiscal year under Section 2 of this Act," the Children's Bureau is given free hand "as it may deem necessary" in the way of employment of assistants, traveling expenses, office expenses, and so on.

The above represents the great structure which is attempted to be builded by Congress in this law under the "General Welfare" clause, which all, including Judge Story, hold imbraces no substantive grant of power. This

structure therefore places the position of those opposed to the law on impregnable ground.

In conclusion; we have sought in this argument to show that Congress, under the general welfare clause, has not the power to appropriate money for any purposes which it may deem suitable; and in support of that view, we have shown that the convention which proposed the Constitution to the people had before it, in several forms, this unlimited power of Congress to legislate in all matters for the interests of the Union and it was rejected. It would seem that this should end the argument. We have shown that Judge Story and Mr. Pomeroy alone among the law writers endorse this view, while arrayed against them are Madison, Jefferson, Marshall, Cooley, Judge Miller, Hare, Von Holst, Willoughby and Tucker.

We have attempted to show that the atmosphere surrounding the making of the Constitution was so deeply impregnated with the fear of Federal power that no Article containing what is now claimed for this could ever have become a part of the Constitution; that if the expression "the general welfare" had no such meaning when proposed by the Federal Convention, or when ratified by the people, it can have no such meaning now. But even if Judge Story's position be accepted as correct, this law is still unconstitutional, for while he claims the right of Congress to appropriate money for any purpose deemed by it to be for the "general welfare," he denied to Congress any power of legislation, under this clause, *of a substantive character,* so that this law must still be deemed unconstitutional: (1) because the welfare is not general, but special; and (2) because the law first creates a structure to receive the gift (which Judge Story says is denied to Congress) and then attempts to land the appropriation in the created organism.

With every confidence, therefore, in our position against the validity of this sweeping power in Congress, we feel an increased confidence that the Court will also be able to hold the law invalid on other grounds, which have been presented, and thereby save our Federal Government from the threatening rocks of Socialism.

HENRY ST. GEORGE TUCKER,

Amicus Curiae.

Washington, D. C., ~~February 12~~ April 30, 1923.